CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 256.

THE MERCHANTS NATIONAL BANK OF CINCINNATI, PLAINTIFF IN ERROR,

vs.

THERESA J. WEHRMANN, EXECUTRIX OF WILLIAM F. WEHRMANN, DECEASED, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED MAY 6, 1905.

(19,750.)

(19,750.)

SUPREME COURT OF THE UNITED STATES.

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THERESA J. WEHRMANN, EXECUTRIX OF WILLIAM F. WEHRMANN, DECEASED, ET AL.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 1, 1906.

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1 In the Supreme Court of Ohio.

THE STATE OF OHIO, *City of Columbus.*

To the Honorable the Supreme Court of the United States:

Pursuant to the command of your within Writ of Error, directed to us, we, under our Seal, distinctly and openly, the record and proceedings within mentioned, with all things concerning the same, before the Judges within named in a certain authenticated transcript to this Writ attached, send, as within we are commanded.

In witness whereof, I Lawson E. Emerson Clerk of the Supreme Court of Ohio, have set my hand and seal of said Court this First day of May, A. D., 1905.

[Seal of the Supreme Court of the State of Ohio.]

LAWSON E. EMERSON,
Clerk, Supreme Court of Ohio,
By J. G. OBERMEYRE, *Deputy.*

2 In the Supreme Court of Ohio.

No. 9039.

THE MERCHANTS' NATIONAL BANK OF CINCINNATI, a Corporation Organized under the Banking Laws of the United States and Doing Business in the City of Cincinnati, Plaintiff in Error,

vs.

THERESA J. WEHRMANN, Executrix of the Estate of William F. Wehrmann, Deceased; James C. Armstrong, Floris A. Sackett, and Isaac B. Matson, Executors under the Last Will and Testament of James M. Armstrong, Deceased; Margaret McArdle, Administratrix of the Estate of James McArdle, Deceased; Irvin M. Krohn, Stanley Krohn, and H. S. Livingston, Exec's of Moses Krohn, Dec'd; Sarah Feiss, Executrix of the Estate of Leopold Feiss, Deceased; Benjamin Pritz, W. W. Brown, Trustee; John Brokamp, Myron A. Spencer, Adam T. Voll, Peter G. Thompson, Joseph Taylor, Ella C. O'Donnell, Executrix of the Estate of Peter J. Dunn, Deceased; Michael Marcus, Frank B. McFarlan, J. Fred Woltz, Adeline A. Stubbs, M. Louise Armstrong, William H. Martin, Louise V. Steward, Caroline Bohnert, E. Reeder Donohue and C. H. Avery, Receivers of the Emperor Building & Loan Company, a Corporation Organized under the Laws of the State of Ohio; George Gunckel; Julia Murphy; The Fifth National Bank, a Corporation Organized under the Laws of the United States; Alfred G. Allen, C. B. Matthews, C. B. Matthews and Harlan Cleveland, Partners doing Business under the Firm Name of Matthews & Cleveland; C. B. Matthews, Harlan Cleveland, and Robert Bowler, Partners doing Business under the Firm Name of Matthews, Cleveland & Bowler; Jacob Shroder, James E. Robinson, Alice G. Hunt, John M. Jameson, Edward A. Sherman, David Spritz, Fannie Tuchfarber, Caroline Voll, Stella C. Voll, Clara

V. Jameson, Christine Emmeluth, Alice Jones, Clement
3 Bates, The *The* U. S. Grant Building & Loan Company, Harry Q. Cleneay, and Mary J. C. Johnstone, Executors and Trustees of the Estate of George W. B. Cleneay, deceased, and Joseph Cleneay, Rudolph Gohs, Henry W. Meier, Harry D. Brown, Gertrude Marcus, John W. Fisher, John M. Bolan, A. W. Williamson, Gertrude Spencer, Gertrude A. Spencer, George M. A. Spencer, Richard Hempel, The Second National Bank, Rebecca K. Brown, Anna L. McFarlan, Benjamin F. Erhman, William A. R. Tenney, Frederick Kinsinger, Administrator, Defendants in Error.

Petition for Writ of Error.

To the Honorable William Z. Davis, Chief Justice of the Supreme Court of the State of Ohio:

The petition of the Merchants National Bank of Cincinnati, a corporation organized under the banking laws of the United States, respectfully shows:

That heretofore, to-wit, on the 2nd., day of July, 1897, there was tried in the common pleas court, in the county of Hamilton, and State of Ohio, a case in which William F. Wehrman was plaintiff and your petitioner, among others, was defendant.

The petition of the plaintiff in said cause was a petition to wind up a partnership known as "The Elsmere Syndicate," and the said petition alleged that your petitioner herein was a member of said partnership, and liable as such, for the indebtedness of said partnership;

Upon the trial of said cause in said Common Pleas Court, your petitioner, both by its answer, and by motion made in said
4 cause, as appears from the record therein, set up that it was a corporation organized under the Banking Laws of the United States, and that as such corporation, it had no power, under such laws, to become liable for the indebtedness of the said "The Elsmere Syndicate."

That subsequently said Common Pleas Court, in spite of the objection so made by this petitioner, rendered a judgment against your petitioner on account of the indebtedness of the said The Elsmere Syndicate, on account of nine shares interest alleged to be owned by your petitioner in said syndicate, the amount of said judgment not being exactly stated therein;

That subsequently, the said case was appealed by your petitioner to the Circuit Court of Hamilton County, State of Ohio, and, upon the trial in said court, your petitioner claimed and showed that it was a corporation organized under the banking laws of the United States, and that, as such a corporation, it had no power to become liable for the indebtedness of the said The Elsmere Syndicate.

That subsequently, said Circuit Court decided said contention adversely to your petitioner, and held that your petitioner had power, under said banking laws, to become liable for the indebtedness of said The Elsmere Syndicate, and rendered a judgment against your

petitioner for $17,002.82, on account of the indebtedness of said The Elsmere Syndicate;

That subsequently, your petitioner filed a petition in error in this court to said judgment of said Circuit Court, and claimed in said petition that your petitioner was a corporation organized under the banking laws of the United States, and that as such a corporation, it had no power to become liable for the indebtedness of said The Elsmere Syndicate;

That subsequently, at the January Term, 1903, of this Court, this court reversed the said judgment of the Circuit Court of Hamilton County, and remanded the case to that court to ascertain the debts and liabilities of the Elsmere Syndicate, still remaining unpaid, and to render judgment against your petitioner for nine fortieths of said indebtedness;

That subsequently, at the January Term 1904, of the said Circuit Court of Hamilton County, said cause came on again for hearing, and your petitioner showed and alleged before said Circuit Court that your petitioner was a corporation organized under the banking laws of the United States, and as such a corporation had no power to become liable for any part of the indebtedness of said The Elsmere Syndicate;

That subsequently, at said term of said Circuit Court, said Circuit Court decided said contention adversely to your petitioner, and rendered judgment against your petitioner in the sum of $9,176.13, on account of the said indebtedness of the said the Elsmere Syndicate.

That thereupon, your petitioner filed a petition in error to said judgment of the circuit court, and in said petition in error claimed and showed to this court that your petitioner was a corporation organized under the banking laws of the United States, and as such had no power to become liable for any part of the indebtedness of said The Elsmere Syndicate;

That subsequently, this court decided said contention of your petitioner adversely to the claim of your petitioner, and held that your petitioner had power, under said banking laws to become liable for nine fortieths of the indebtedness of The Elsmere Syndicate, and rendered final judgment against your petitioner, affirming, in all respects, the said judgment of the Circuit Court of Hamilton County, Ohio;

Your petitioner further shows that the said judgment of this court was and is a final judgment in the highest court of the State of Ohio, in which a decision in said suit could or can be had.

Your petitioner further shows that a Federal question was made in said cause, to-wit, as hereinbefore set out, and that said judgment of this court was repugnant to and in conflict with the banking laws of the United States, and specifically in conflict with sections 5136, and 5137, of the Revised Statutes of the United States;

Wherefore your petitioner prays that a writ of error to said Supreme Court be allowed, that a citation be granted and signed; that the bond herewith presented be approved, and that, upon compliance with the terms of the statutes in such cases made and provided,

said bond and writ of error may operate as a supersedeas, that the errors complained of may be reviewed in the Supreme Court of the United States and the judgment aforesaid of said Supreme Court of Ohio be reversed.

THE MERCHANTS' NATIONAL BANK
OF CINCINNATI,
By Its Attorneys in Law and in Fact.
HERRON, GATCH, HERRON AND JAMES,
Attorneys and of Counsel for Petitioner.

The writ of error as prayed for in the foregoing petition is hereby allowed this 7th day of March, A. D. 1905, the writ of error to operate as a supersedeas and the bond for that purpose is fixed at the sum of $18,352.26.

Dated at Columbus this 7th day of March, A. D. 1905.

W. Z. DAVIS,
Chief Justice of the Supreme Court of the State of Ohio.

Filed in my office this 7th day of March, A. D. 1905.

LAWSON E. EMERSON,
Clerk of the Supreme Court of the State of Ohio.
By J. J. OBERMEYRE, *Deputy.*

7 [Endorsed:] No. 9039. In the Supreme Court of Ohio The Merchants' National Bank a corporation etc., Plaintiff in Error, *vs.* Theresa J. Wehrmann, Executrix, etc. *et al.*, Defendants in Error. Petition for Writ of Error. Filed Supreme Court of Ohio Mar. 7, 1905 L. E. Emerson Clerk. Herron, Gatch & Herron, Attorneys at Law.

8 In the Supreme Court of Ohio.

No. 9039.

THE MERCHANTS NATIONAL BANK OF CINCINNATI, a Corporation Organized under the Banking Laws of the United States and Doing Business in the City of Cincinnati, Plaintiff in Error,

vs.

THERESA J. WEHRMANN, Executrix of the Estate of William F. Wehrmann, Deceased; James C. Armstrong, Floris A. Sackett, and Isaac B. Matson, Executors under the Last Will and Testament of James M. Armstrong, Deceased; Margaret McArdle, Administratrix of the Estate of James McArdle, Deceased; Irvin M. Krohn, Stanley Krohn, and H. S. Livingston, Exec's of Moses Krohn, Dec'd; Sarah Feiss, Executrix of the Estate of Leopold Feiss, Deceased; Benjamin Pritz, W. W. Brown, Trustee; John Brokamp, Myron A. Spencer, Adam T. Voll, Peter G. Thompson, Joseph Taylor, Ella C. O'Donnell, Executrix of the Estate of Peter J. Dunn, Deceased; Michael Marcus, Frank B. McFarlan, J. Fred Woltz, Adeline A. Stubbs, M. Louise Armstrong, William H. Martin, Louise V. Stewart, Caroline Bohnert, E. Reeder Donohue, and C. H. Avery, Receivers of the Emperor Building & Loan Company, a Corporation Organized under the Laws of the

State of Ohio; George Gunckel, Julia Murphy, The Fifth National Bank, a Corporation Organized under the Laws of the United States; Alfred G. Allen, C. B. Matthews, C. B. Matthews and Harlan Cleveland, Partners Doing Business under the Firm Name of Matthews & Cleveland; C. B. Matthews, Harlan Cleveland, and Robert Bowler, Partners Doing Business under the Firm Name of Matthews, Cleveland & Bowler; Jacob Shroder, James E. Robinson, Alice G. Hunt, John M. Jameson, Edward A. Sherman, David Spritz, Fannie Tuchfarber, Caroline Voil, Stella C. Voil, Clara V. Jameson, Christine Emmeluth, Alice
9 Jones, Clement Bates, The *The* U. S. Grant Building & Loan Company, Harry Q. Cleneay, and Mary J. C. Johnstone, Executors and Trustees of the Estate of George W. B. Cleneay, Deceased, and Joseph Cleneay, Rudolph Gohs, Henry W. Meier, Harry D. Brown, Gertrude Marcus, John W. Fisher, John M. Bolan, A. W. Williamson, Gertrude Spencer, Gertrude A. Spencer, George M. A. Spencer, Richard Hempel, The Second National Bank, Rebecca K. Brown, Anna L. McFarlan, Benjamin F. Erhman, William A. R. Tenney, Frederick Kinsinger, Administrator, Defendants in Error.

Assignment of Errors.

Now comes the said plaintiff in error and respectfully submits that in the record, proceedings, decision, and final judgment of the Supreme Court of the State of Ohio, in the above entitled matter there is manifest error in this, to-wit:

First. The Court erred in its construction of the Banking Laws of the United States, and specifically in its construction of Sections 5136 and 5137 of the Revised Statutes of United States, relating to National Banks, and in holding that the plaintiff in error, a corporation organized under said banking laws of the United States, had power, under such laws, and specifically under said Sections 5136 and 5137, to become liable for any part of the indebtedness of the Elsmere Syndicate a partnership dealing in real estate;

Second. The court erred in its construction of the banking laws of the United States, and specifically in its construction of Sections 5136 and 5137, of the Revised Statutes of the United States relating to National Banks, and in holding that the plaintiff in error, a corporation organized under said banking laws, had power, under such laws, to become liable for that portion of the indebtedness of The Elsmere Syndicate, a partnership dealing in land, which in-
10 debtedness was incurred by said syndicate, prior to January 15, 1892.

Third. The court erred in rendering final judgment against the plaintiff in error, in confirming the judgment of the Circuit Court of Hamilton County, Ohio, which said judgment of the Circuit Court ordered the plaintiff in error to pay $9,176.13, as its share of the indebtedness of the Elsmere syndicate, a partnership dealing in land.

HERRON, GATCH, HERRON & JAMES.
Attorneys for Plaintiff in Error.

11 [Endorsed:] No. 9039 In The Supreme Court of Ohio. The Merchants National Bank, Plaintiff in Error, *vs.* Theresa J. Wehrmann, *et al.*, Defendants in Error. Assignment of Errors. Filed Supreme Court of Ohio Mar. 7 1905 L. E. Emerson clerk.

12 In the Supreme Court of Ohio.

No. 9039.

THE MERCHANTS NATIONAL BANK OF CINCINNATI, a Corporation Organized under the Banking Laws of the United States, and Doing Business in the City of Cincinnati, Plaintiff in Error,

vs.

THERESA J. WEHRMANN, Executrix of the Estate of William F. Wehrmann, Deceased; James C. Armstrong, Floris A. Sackett, and Isaac B. Matson, Executors under the Last Will and Testament of James M. Armstrong, Deceased; Margaret McArdle, Administratrix of the Estate of James McArdle, Deceased; Irvin M. Krohn, Stanley Krohn, and H. S. Livingston, Exec's of Moses Krohn, D'c'd; Sarah Feiss, Executrix of the Estate of Leopold Feiss, Deceased; Benjamin Pritz, W. W. Brown, Trustee; John Brokamp, Myron A. Spencer, Adam T. Voll, Peter G. Thompson, Joseph Taylor, Ella C. O'Donnell, Executrix of The Estate of Peter J. Dunn, Deceased; Michael Marcus, Frank B. McFarlan, J. Fred Woltz, Adeline A. Stubbs, M. Louise Armstrong, William H. Martin, Louise V. Stewart, Caroline Bohnert, E. Reeder Donohue, and C. H. Avery, Receivers of the Emperor Building & Loan Company, a Corporation Organized under the Laws of the State of Ohio; George Gunckel; Julia Murphy, The Fifth National Bank, a Corporation Organized under the Laws of the United States; Alfred G. Allen, C. B. Matthews, C. B. Matthews and Harlan Cleveland, Partners Doing Business under the Firm Name of Matthews & Cleveland; C. B. Matthews, Harlan Cleveland, and Robert Bowler, Partners Doing Business under the Firm Name of Matthews, Cleveland & Bowler; Jacob Shroder, James E. Robinson, Alice G. Hunt, John M. Jameson, Edward A. Sherman, David Spritz, Fannie Tuchfarber, Caroline Voll, Stella C. Voll, Clara V. Jameson, Christine Emmeluth, Alice Jones, Clement Bates,

13 The *The* U. S. Grant Building & Loan Company, Harry Q. Cleneay and Mary J. C. Johnstone, Executors and Trustees of the Estate of George W. B. Cleneay, deceased, and Joseph Cleneay, Rudolph Gohs, Henry W. Meier, Harry D. Brown, Gertrude Marcus, John W. Fisher, John M. Bolan, A. W. Williamson, Gertrude Spencer, Gertrude A. Spencer, George M. A. Spencer, Richard Hempel, The Second National Bank, Rebecca K. Brown, Anna L. McFarlan, Benjamin F. Erhman, William A. R. Tenney, Frederick Kinsinger, Administrator, Defendants in Error.

Bond on Writ of Error.

Know all men by these Presents, that we, The Merchants National Bank of Cincinnati, as principal, and The United States Fidelity

and Guaranty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto the defendants in error herein, in the sum of Eighteen Thousand Three Hundred and Fifty Two and $\frac{36}{100}$ Dollars to be paid to the said obligees, and their successors, representatives, and assigns; to the payment of which well and truly to be made, we bind ourselves, and our successors, jointly and severally, by these presents.

Sealed with our seals and dated this 7th day of March A. D. 1905.

Whereas the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Ohio,

Now, Therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

[Endorsed:] No. 9039. In the Supreme Court of Ohio. The Merchants National Bank, Plaintiff in Error, *vs.* Theresa J. Wehrmann, *et al.*, Def'ts in Error. Bond of Writ in Error.

[Seal of the Merchants National Bank of Cincinnati, O.]

14 THE MERCHANTS NAT'L BANK,
CINCINNATI, OHIO,
By W. W. BROWN, *Att'y.*

{Seal of the United States Fidelity & Guaranty Company, Incorporated 1896.}

THE UNITED STATES FIDELITY
AND GUARANTY CO.,
By HAROLD H. TALLMADGE,
Its Attorney in Fact.

15 [Endorsed:] No. 9039. In the Supreme Court of Ohio. The Merchants National Bank, a corporation etc. Plaintiff in Error *vs.* Theresa J. Wehrmann *et al.* Def'ts in Error. Bond on Writ of Error. Filed Supreme Court of Ohio Mar. 7 1905. L. E. Emerson, Clerk.

16 In the Supreme Court of Ohio.

No. 9039.

THE MERCHANTS NATIONAL BANK, Plaintiff in Error,
vs.
THERESA J. WEHRMANN ET AL., Defendants in Error.

Order Allowing Writ of Error.

The above entitled matter came on to be heard upon the petition of the plaintiff in error therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio,

and, upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter;

It is ordered that a writ of error be, and is hereby, allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be, and the same is hereby, approved.

W. Z. DAVIS,
Chief Justice of the Supreme Court of the State of Ohio.

17 [Endorsed:] No. 9039. In the Supreme Court of Ohio. The Merchants National Bank, Plaintiff in Error, *vs.* Theresa J. Wehrmann *et al.* Defendants in Error. Order Allowing Writ of Error. Filed Supreme Court of Ohio Mar. 7 1905 L. E. Emerson Clerk.

18 In the Supreme Court of Ohio.

No. 9039.

THE MERCHANTS NATIONAL BANK OF CINCINNATI, ETC., Plaintiff in Error,

vs.

THERESA J. WEHRMANN, Executrix, *et al.*, Defendants in Error.

Waiver of Citation.

We, the undersigned defendants in error in the above case, hereby waive the issue and service of citation on the writ of error heretofore allowed in the above cause.

19 THERESA J. WEHRMAN, *Executrix*,
By C. B. MATTHEWS, *Her Attorney.*
JAMES C. ARMSTRONG,
FLORIS A. SACKETT, AND
ISAAC B. MATSON, *Executors, etc.*,
By J. SHRODER, *Att'y.*
MARGARET McARDLE, *Administratrix*,
By OUTCOLT & FORAKER, *Her Att'ys.*
THE EXECUTORS OF THE ESTATE OF MOSES KROHN, D'C'D.,
By J. SHRODER, *Att'y.*
SARAH FEISS, *Executrix*,
By J. SHRODER, *Att'y.*
BENJAMIN PRITZ,
By WM. B. MAY, *Att'y.*
W. W. BROWN, *Trustee*,
By HERRON, GATCH, HERRON & JAMES, *Att'ys.*
JOHN BROKAMP,
By KRAMER & KRAMER, *His Att'ys.*
MYRON A. SPENCER,
By C. B. MATTHEWS, *His Att'y.*

ADAM T. VOLL,
By C. B. MATTHEWS, *His Att'y.*
PETER G. THOMPSON,
By C. B. MATTHEWS, *His Att'y.*
JOSEPH TAYLOR,
By HARPER & ALLEN, *Att'ys.*
ELLA C. O'DONNELL, *Executrix,*
By L. M. MONGAN, *Attorney.*
20 MICHAEL MARCUS,
By SAMUEL WOLFSTEIN, *Att'y.*
J. FRED WOLTZ,
By —— ——.
ADELINE A. STUBBS,
By SCHWAB & MERRILL, *Att'ys.*
M. LOUISE ARMSTRONG,
By SCHWAB & MERRILL, *Att'ys.*
WILLIAM H. MARTIN,
By GIDEON C. WILSON, *Att'y.*
LOUISE V. STEWART,
By WILSON & DE WITT, *Att'ys.*
CAROLINE BOHNERT,
By GIDEON C. WILSON, *Att'y.*
E. REEDER DONOHUE AND
C. H. AVERY,
Receivers of the Emperor Building & Loan Company,
By E. R. DONOHUE &
C. HAMMOND AVERY, *Attorneys.*
GEORGE GUNCKEL,
By KNIGHT & JONES, *Att'ys.*
JULIA MURPHY,
By GIDEON C. WILSON, *Att'y.*
THE FIFTH NATIONAL BANK,
By BOYCE & BOYD, *Att'ys.*
ALFRED G. ALLEN,
By HARPER & ALLEN.
C. B. MATTHEWS,
By C. B. MATTHEWS, *In Person.*
21 C. B. MATTHEWS AND
HARLAN CLEVELAND,
Partners Doing Business under the Firm Name of Matthews & Cleveland,
By HARLAN CLEVELAND, *Liq. Partner.*
C. B. MATTHEWS,
HARLAN CLEVELAND, AND
ROBERT BOWLER, *Partners, etc.,*
By HARLAN CLEVELAND, *Liq. Partner.*
JACOB SHRODER,
By J. SHRODER.
JAMES E. ROBINSON,
By J. SHRODER, *Att'y.*

ALICE G. HUNT,
By HARMAN, COLSTON, GOLDSMITH & HOADLY, *Att'ys.*
JOHN M. JAMESON,
By DAVID S. OLIVER, *Att'y.*
EDWARD A. SHERMAN,
By A. T. VOLL.
DAVID SPRITZ,
By DAVID S. OLIVER, *Att'y.*
FANNIE TUCHFARBER,
By A. T. VOLL.
CAROLINE VOLL,
By A. T. VOLL.
STELLA C. VOLL,
By A. T. VOLL.
CLARA V. JAMESON,
By A. T. VOLL.
CHRISTINE EMMELUTH,
By GIDEON C. WILSON, *Att'y.*
22 ALICE JONES,
By JAMES J. MUIR, *Attorney.*
CLEMENT BATES,
By CLEMENT BATES.
SECOND NATIONAL BANK,
By BYRON M. CLENDENING, *Attorney.*
HARRY D. BROWN AND
REBECCA K. BROWN,
By GEORGE A. TURRILL, *Attorney.*
WILLIAM A. R. TENNEY,
By CHAS. E. TENNEY, *Att'y.*
H. W. MEIER, SR.,
By CHRIS. VON SEGGERN.
A. W. WILLIAMSON,
GERTRUDE SPENCER,
GERTRUDE A. SPENCER,
GEORGE M. A. SPENCER,
By C. B. MATTHEWS.

23 [Endorsed:] In the Supreme Court of Ohio. #9039. The Merchants Nat'l Bank of Cin'ti *vs.* Wehrman *et al.* Waiver of citation Filed Supreme Court of Ohio Apr. 15 1905 L. E. Emerson, clerk.

24 In the Supreme Court of Ohio.

No. 9039.

THE MERCHANTS NATIONAL BANK OF CINCINNATI, ETC., Plaintiff in Error,

vs.

THERESA J. WEHRMANN, Executrix, ET AL, Defendants in Error.

Waiver of Citation.

I, the undersigned, defendant in error in the above case, hereby waive the issue and service of citation on the writ of error heretofore allowed in the above cause.

J. FRED WOLTZ.

25 [Endorsed:] In the Supreme Court of Ohio. #9039. The Merchants Nat'l Bank of Cin'ti *vs.* Wehrman *et al.* Waiver of Citation Filed Supreme Court of Ohio Apr. 15, 1905. L. E. Emerson, clerk.

26 In the Supreme Court of Ohio.

No. 9039.

THE MERCHANTS NATIONAL BANK OF CINCINNATI, a Corporation Organized under the Banking Laws of the United States, and Doing Business in the City of Cincinnati, Plaintiff in Error,

vs.

THERESA J. WEHRMANN, Executrix of the Estate of William F. Wehrmann, Deceased; James C. Armstrong, Floris A. Sackett and Isaac B. Matson, Executors under the Last Will and Testament of James M. Armstrong, Deceased; Margaret McArdle, Administratrix of the Estate of James McArdle, Deceased; Irvin M. Krohn, Stanley Krohn and H. S. Livingston, Executors of Moses Krohn, Deceased; Sarah Feiss Executrix of the Estate of Leopold Feiss, Deceased; Benjamin Pritz, W. W. Brown, Trustee; John Brokamp, Myron A. Spencer, Adam T. Voll, Peter G. Thompson, Joseph Taylor, Ella C. O'Donnell, Executrix of the Estate of Peter J. Dunn, Deceased; Michael Marcus, Frank B. McFarlan, J. Fred Woltz, Adeline A. Stubbs, M. Louise Armstrong, William H. Martin, Louise V. Stewart, Caroline Bohnert, E. Reeder Donohue and C. H. Avery, Receivers of the Emperor Building & Loan Company, a Corporation Organized under the Laws of the State of Ohio; George Gunckel, Julia Murphy, The Fifth National Bank, a Corporation Organized under the Laws of the United States; Alfred G. Allen, C. B. Matthews, C. B. Matthews and Harlan Cleveland, Partners Doing Business under the Firm Name of Matthews & Cleveland; C. B. Matthews, Harlan Cleveland and Robert Bowler, Partners Doing Business under the Firm Name of Matthews, Cleveland & Bowler; Jacob Shroder, James E. Robin-

son, Alice G. Hunt, John M. Jameson, Edward A. Sherman, David Spritz, Fannie Touchfarber, Caroline Voll, Stella C. Voll, Clara V. Jameson, Christine Emmeluth, Alice Jones, Clement
27 Bates, The U. S. Grant Building & Loan Company, Rudolph Gohs, Henry W. Meier, Harry D. Brown, Gertrude Marcus, John W. Fisher, John M. Bolan, A. W. Williamson, Gertrude Spencer, Gertrude A. Spencer, George M. A. Spencer, Richard Hempel, The Second National Bank, Rebecca K. Brown, Anna L. McFarlan, Benjamin F. Ehrman, William A. R. Tenney, Frederick Kinsinger, Administrator, Defendants in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Ohio, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Ohio, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Merchants National Bank of Cincinnati a corporation organized under the banking laws of the United States and Theresa J. Wehrman, Executrix of the Estate of William F. Wehrman, deceased; James C. Armstrong, Floris A. A. Sackett and Isaac B. Matson, Executors under the Last Will and Testament of James M. Armstrong deceased; Margaret McArdle, Administratrix of the Estate of James McArdle, deceased; Irvin M. Krohn, Stanley Krohn and H. S. Livingston, Executors of
28 Moses Krohn, deceased; Sarah Feiss, executrix of the estate of Leopold Feiss, deceased; Benjamin Pritz, W. W. Brown, trustee; John Prokamp, Myron A. Spencer, Adam T. Voll, Peter G. Thompson, Joseph Taylor, Ella C. O'Donnell, executrix of the estate of Peter J. Dunn, deceased; Michael Marcus, Frank B. McFarlan, J. Fred Woltz, Adeline A. Stubbs, M. Louise Armstrong, William H. Martin, Louise V. Stewart, Caroline Bohnert, E. Reeder Donohue and C. H. Avery, receivers of the Emperor Building & Loan Company, a corporation organized under the laws of the State of Ohio; George Gunckel; Julia Murphy, the Fifth National Bank, a corporation organized under the laws of the United States; Alfred G. Allen, C. B. Matthews, C. B. Matthews and Harlan Cleveland, partners doing business under the firm name of Matthews & Cleveland, C. B. Matthews, Harlan Cleveland and Robert Bowler, partners doing business under the firm name of Matthews, Cleveland & Bowler; Jacob Shroder, James E. Robinson, Alice G. Hunt, John M. Jameson, Edward A. Sherman, David Spritz, Fannie Tuchfarber, Caroline Voll, Stella C. Voll, Clara V. Jameson, Christine Emmeluth, Alice Jones, Clement Bates, the U. S. Grant Building & Loan Company, Rudolph Gohs, Henry W. Meier, Harry D. Brown, Gertrude Marcus, John W. Fisher, John M. Bolan, A. W. William-

son, Gertrude Spencer, Gertrude A. Spencer, George M. A. Spencer, Richard Hempel, the Second National Bank, Rebecca K. Brown, Anna L. McFarlan, Benjamin F. Ehrman, William A. R. Tenney, Frederick Kinsinger, administrator, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity;

29 or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said the Merchants National Bank of Cincinnati, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in his behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the fifth day of May 1905, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court, the 6th day of April, in the year of our Lord, one thousand nine hundred and five.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

(Signed) B. R. COWEN,
Clerk of the Circuit Court of the United States
for the Southern District of Ohio.

Allowed by
WILLIAM Z. DAVIS,
Chief Justice of the Supreme Court of the State of Ohio.

30 [Endorsed:] No. 9039. In the Supreme Court of Ohio. The Merchants National Bank of Cincinnati, a corporation, etc., plaintiff in error, *vs.* Theresa J. Wehrmann, *et al.*, defendants in error. Writ of error. Filed Supreme Court of Ohio Apr. 15, 1905. L. E. Emerson, clerk. Herron, Gatch & Herron, attorneys at law.

31 In the Supreme Court of Ohio.

No. 9039.

THE MERCHANTS NATIONAL BANK OF CINCINNATI, Plaintiff in Error,
vs.
THERESA J. WEHRMAN, Executrix, ET AL., ETC., Defendants in Error.

Precipe for Transcript of Record.

To the Clerk of the Supreme Court of Ohio:

Please transcribe for record on writ of error to the Supreme Court of the United States the following pages of the printed records respectively designated herein as Record A and B. The first being filed in case 8133, and the second in case 9039, and no other pages:

Record A.

Page 22 to the middle of Page 26, being petition filed in the Common Pleas Court July 2, 1897;

From middle of page 28 to middle of page 29, being answer of Merchants National Bank filed November 13, 1897.

From bottom of Page 31 to middle of page 39, ending "Respectfully submitted, Clement Bates, Master. January 15, 1900;" being a portion of the report of the Special Master filed January 18, 1900.

Pages 247 to middle of Page 257 being Exhibits 1, 2, 3, and 4, down to Exhibit 5;

Page 343, Exhibit 6*a*, being form of the certificate of stock in the Elsmere Syndicate.

From bottom of Page 261 to middle of page 263 which is headed as follows: "By-Laws of The Elsmere Syndicate," and ends with the words "at all meetings each shareholder shall be entitled to
32 one vote for each share of stock held by him and a majority in interest so voting shall govern;" *i. e.* down to the words on Page 263, "(Page 10)."

From the bottom of Page 9 to the bottom of Page 19, being the minute 183 Judgment Entry, dated May 5, 1902, of the Circuit Court of Hamilton County.

From the top of Page 21 to the middle of Page 21, being the motion for a new trial of The Merchants National Bank filed May 6, 1902.

From the middle of Page 1 to the bottom of Page 3, being the petition in error in the Supreme Court of Ohio of The Merchants National Bank filed September 2, 1902.

Record B.

From the middle of Page 11 to the top of Page 12, being the judgment of the Supreme Court of Ohio entered October 27, 1903.

Page 81, Exhibit 56, being form of a deed given by the Trustees of the Elsmere Syndicate;

From the top of Page 82 to the middle of Page 83, Exhibit 58, being form of a Title Bond and Agreement by the Trustees of The Elsmere Syndicate.

From the middle of Page 83 to the middle of Page 84, Exhibit 63, being form of a deed given by the Trustees of The Elsmere Syndicate.

From the middle of Page 86 to the middle of Page 88, Exhibits 67, 68 and 74.

From the bottom of Page 89 to the top of Page 95 being marked "Exhibit-Building Association" and the other exhibits to the end of said Record.

From the middle of Page 13, to the bottom of Page 19 being the minute 375 of the Circuit Court of Hamilton County, entered April 8, 1904, and being the final decree in said court

From the middle of Page 20 to the middle of Page 21, being the motion for a new trial of The Merchants National Bank filed
33 April 9, 1904, and the entry overruling the same filed May 17, 1904.

From Page 1 to the bottom of Page 3, being the petition in error of The Merchants National Bank in the Supreme Court of Ohio, filed June 10, 1904;

The Judgment Entry and Mandate of the Supreme Court last entered in this cause, and all the papers and proceedings filed in this case since that time, *i. e.* all the entries and papers filed in the case since the last hearing on the second Petition in Error, including this precipe.

HERRON, GATCH, HERRON & JAMES,
Att'ys for the Merchants Nat'l Bank of Cin'ti.

April 14th 1905.

34 [Endorsed:] No. 9039. In the Supreme Court of Ohio. The Merchants National Bank of Cincinnati Plaintiff in Error *vs.* Theresa J. Wehrman, Executrix *et al.*, etc., Defendants in Error. Precipe for Transcript of Record. Filed Supreme Court of Ohio April 15 1905. L. E. Emerson, clerk.

35 Supreme Court of the State of Ohio.

State of Ohio, County of Hamilton, Court of Common Pleas.

WILLIAM F. WEHRMANN, Plaintiff,

vs.

FRANK B. MCFARLAN, MYRON A. SPENCER, JAMES MCARDLE, JR., William Bell, Leopold Feiss, Moses Krohn, Joseph Taylor, J. Fred Woltz, W. B. Kennedy, Ella C. O'Donnell, Executrix under the Last Will and Testament of Peter J. Dunn, Deceased; Benjamin Pritz, W. W. Brown, Trustee of the Merchants National Bank of Cincinnati, Ohio; The Merchants National Bank of Cincinnati, Ohio, a Corporation under the Laws of the United States of America; Richard Hempel, Trustee of the Second National Bank of Cincinnati, Ohio; The Second National Bank of Cincinnati, Ohio, a Corporation under the Laws of the United States of America; and James C. Armstrong, Floris A. Sackett, and Isaac B. Matson, Executors under the Last Will and Testament of James M. Armstrong, Deceased, and Margaret McArdle, Administratrix of the Estate of James McArdle, Deceased, Partners Doing Business in the State of Ohio under the Firm Name of Elsmere Syndicate, Defendants.

Petition.

(Filed July 2, 1897.)

Plaintiff represents to the Court that the defendants, Frank B. McFarlan, Myron A. Spencer, James McArdle, William Bell, Leopold Feiss, Moses Krohn, Joseph Taylor, J. Fred Woltz, W. B. Kennedy, Benjamin Pritz, W. W. Brown, Trustee of the Merchants National Bank of Cincinnati, Ohio; the Merchants National Bank of Cincinnati, Ohio, a corporation under the laws of the United States of America; Richard Hempel, trustee of the Second National Bank of Cincinnati, Ohio; The Second National Bank of Cincinnati, Ohio, a corporation under the laws of the United States of America; Peter J. Dunn, now deceased; James M. Armstrong, now deceased,
36 and James McArdle, now deceased, were and are partners doing business in the county of Hamilton and State of Ohio under the name of the Elsmere Syndicate, and that Peter J. Dunn is now deceased, and the interest of said Peter J. Dunn in said partnership is now held and represented therein by Ella C. O'Donnell (formerly Ella C. Dunn), executrix under the last will and testament of Peter J. Dunn, deceased; that James M Armstrong has departed this life and the interest of said James M. Armstrong in said partnership is now held and represented therein by James C. Armstrong, Floris A. Sackett and Isaac B. Matson, executors under the last will and testament of James M. Armstrong, deceased, and that James McArdle is now deceased, and the interest of said James McArdle in said partnership is now held and represented therein by Margaret McArdle, administratrix of the estate of James McArdle, deceased.

Plaintiff further says that on or about the 13th day of February, 1889, defendants and plaintiff formed what is known as a syndicate for the purpose of dealing in land, and that said syndicate, although the interests therein were represented by certificates given to each holder of an interest of a certain share or number of shares, in fact was not a corporation, but was a mere partnership in which certain persons held aliquot shares or interest; that shortly after the organization of this syndicate the members thereof obtained from George W. B. Cleneay and Joseph S. Cleneay, who were at that time the owners thereof in fee simple, a leasehold interest in a large quantity of land contiguous to the City of Cincinnati and also to the village of Norwood in Hamilton County aforesaid, which said lease required the payment of all taxes and assessments and of certain rent, to-wit, the sum of $— per annum, payable quarterly, and the said leasehold interest was vested in trustees for the use of the members of said syndicate, and for the purpose of making sales and deeds, the said lease containing a clause that the owner should join in a plat of said property, that individual lots might be sold and conveyed upon the payment to the said Cleneays of a certain
37 amount for such lot, and thereafter a plat was accordingly made subdividing said property into lots and laying out streets, which plat was recorded in the records of Hamilton County in Plat Book No. 8, Vol. 2 at pages 35 and 36.

The plaintiff further says that thereafter the said partnership (which was known as the Elsmere Syndicate) commenced to do business and to sell lots, and did sell a large number of lots and gave deeds for the same when they were purchased on deferred payments, and continued this business up to about the 15th day of June, A. D., 1896, when under foreclosure proceedings for back rents and unpaid taxes that had accrued, the said George W. B. Cleneay and Joseph S. Cleneay sold the interest of said syndicate in the said leasehold at judicial sale, in case No. 4875, in the Circuit Court of the United States, for the Southern District of Ohio, Western Division, and the said Cleneays purchased in the said leasehold interest, and thereafter the said syndicate or partnership had no further interest therein.

Plaintiff further says that for about three years prior to the sale, as aforesaid, the trustee of said syndicate had not been able to make any considerable number of sales of lots, whereas the expenses of maintaining the same were large, and the said syndicate members, as a syndicate, became largely involved in debt, and a large number of members of the syndicate were giving the matter no attention and declined to aid it in any manner with funds, and as a consequence the said partnership, as a partnership, became and continued to be wholly insolvent, and lost substantially all of its assets except as hereinafter mentioned; that certain other members of the syndicate being anxious to maintain the same until times should improve, thinking that thereby they would subserve the interests of all concerned, and that it would prevent the loss of the leasehold property, and would enable them thereafter to make sales and resume business, and with the full knowledge and consent of

all the members of said syndicate and at the express desire and request of the trustees thereof, to-wit: Myron A. Spencer, Frank B. McFarlan and James McArdle, Jr., and an advisory committee of which the vice-president of the Merchants National Bank
38 was one, raised certain moneys for the use and benefit of said syndicate by making their paper or endorsing their paper in the shape of promissory notes, which were used in bank and discounted and the proceeds applied as aforesaid, some of which said notes are still unpaid; and said loans were necessary to save said shareholders so-called from loss; that there is a large number of creditors of said partnership, but as to who they are and the amount owing to each and the manner of contracting all of said indebtedness, this plaintiff is not informed; that at the time of making said loans and contracting said debts the so-called shares owned by the members of this syndicate were forty in number and were owned by the following persons, each respectively owning the number of shares set opposite his name:

J. N. Armstrong	3	shares.
W. W. Brown, trustee Merchants' Nat'l Bank	9	"
William Bell	8	"
W. B. Kennedy	2	"
Leopold Feiss	1	"
Moses Krohn	1	"
Richard Hempel, Trus., Second Nat'l Bank	3	"
James McArdle	1	"
Peter J. Dunn	1	"
Benjamin Pritz	1	"
Myron A. Spencer	3	"
Joseph Taylor	1	"
William F. Wehrmann	5	"
J. F. Woltz	1	"

That the Merchants' National Bank prior to aforesaid insolvency had become the owner of the shares above mentioned as standing in the name of W. W. Brown, trustee, which shares said bank had taken from one Frank B. McFarlan, the former owner thereof, to secure and in payment of a debt due it from said McFarlan, contracted prior to the acquisition of said shares by said bank.

That the Second National Bank, prior to above mentioned insolvency had become the owner of the shares above mentioned as standing in the name of Richard Hempel, trustee, which shares said bank had taken from one John F. Woltz, the former owner thereof, to secure a debt due it from Woltz, contracted prior to the acquisition of said shares by said bank.

Plaintiff further alleges that the said syndicate has ceased to do business, has become insolvent, and has lost all of its property, except certain title bond claims upon which large payments
39 have been made, but their remains something due, and some two or three lots which have been conveyed by the said Cleneays in fee simple for the purpose of the syndicate upon receiving the amount due them; and the said syndicate has long ceased

to be able to prosecute its business, and should be dissolved, and a receiver appointed of its assets for the purpose of releasing them and paying the debts thereof, and an account should be taken between the members due and to whom and in what proportions it shall be paid by the members of said partnership.

Wherefore, this plaintiff asks that this court will state an account of the said partnership affairs, and will dissolve and wind up the same, and will find the amount of its debts, and will state an account between the members of said syndicate, and that in the meantime the court will appoint a receiver of the assets thereof in order that they may be turned into money and applied to the debts, and for such other and further relief as the plaintiff may be in equity entitled to.

C. B. MATTHEWS,
Attorneys for Plaintiff.

(Duly verified.)

40 *Answer of the Merchants National Bank.*

(Filed November 13, 1897.)

Now come the Merchants National Bank, and for answer to the petition herein, it admits that it is a corporation organized under the laws of the United States of America.

It denies that on or about the 13th day of February, 1889, or at any other time, this defendant formed any syndicate or partnership with the plaintiff, or became a member of any syndicate known as the Elsmere Syndicate.

As to the allegations of the petition in regard to the manner in which the said syndicate was formed, its constitution and the property subsequently acquired, this defendant, being ignorant in regard to the said facts, hereby denies the same, and demands strict proof thereof.

This defendant, upon information and belief, admits that the said syndicate did sell certain lots, but this defendant does not know the terms upon which the said lots were acquired by the purchasers thereof; this defendant upon information and belief, admits that at some date to this defendant unknown, the interest of the said Elsmere Syndicate, of whatever nature said interest was, was sold under judicial proceedings to George W. B. Cleneay and Joseph S. Cleneay.

In regard to the allegations in the petition as to the financial difficulties of the said syndicate, and as to the said manner in which it became involved in debt, and as to the efforts of certain members of the syndicate to retrieve its affairs, and of their borrowing certain moneys for the use and benefit of the said syndicate, this defendant knows nothing, and being ignorant thereof, hereby denies the same, and demands strict proof thereof.

This defendant denies that at any time it became the owner of any shares in the said syndicate, either by purchase from anybody or as security for the debt of anybody.

As to the allegations of the petition in regard to the insolvency of the said Elsmere Syndicate and the loss of all of its prop-
41 erty, this defendant knows nothing, and being ignorant thereof, hereby denies the same, and demands strict proof thereof.

Wherefore, this defendant, having fully answered, asks to be hence dismissed, with its costs.

HERRON, GATCH & HERRON,
Attorneys for Defendant.

(Duly verified.)

Report of Special Master.

(Filed January 18, 1900.)

Pursuant to the order of court, I published a notice for three weeks in the Court Index, calling for proof of claims against Elsmere Syndicate, and on the appointed day began the hearing pro and con on all issued undisposed of and as required to be found by the order of the court, and have herewith reported back to court all the testimony and findings.

1st. Assets.—I find there are no assets.

2d. Liabilities.—The following claims are not disputed and are allowed:

Alfred G. Allen, $64.41, due February 22, 1896.
C. B. Matthews, $100.00, due October 1, 1898.
Matthews & Cleveland, $75.00, due May 1, 1895.
Matthews, Cleveland & Bowler, $75.00, due March 1, 1898.
Shroder & Robinson, $360, due July 1, 1896.

The above are all for attorneys' fees on employment by the trustees for various necessary services.

Cleneay Claim.

1st. I find as a matter of law that John Woltz alone is bound by the covenants of the lease,—or at most, after the decree in the United States Court that Woltz and the trustees alone are bound, and not the partners, unless the latter became so by later acts.

2d. If any guaranty could be within the powers of trustees,
42 who had no right to borrow money, certainly a guaranty to further a mere scheme to induce the village of Norwood to pretend to order an improvement which was already made can not bind shareholders who did not participate in or sanction it.

As a large number did not participate, the claim is not a partnership debt, and I do not think it would be right in me to attempt to pass on the liability of participants; hence the claim is disallowed. I may say here, once for all, that the secretary's monthly reports sent to shareholders are not sufficient to create in them any responsibility not otherwise assumed.

William F. Wehrmann's estate claims on a judgment against him in favor of Merchants National Bank for $4,409.66, and interest from

June 2, 1897, rendered in case No. 109040 of the Common Pleas, and costs $52.51. Also, for $574.00; but as no evidence of date was given it may be called $500, with interest from February 28, 1896, (see page 29 of Record). These claims are for money used to pay ground rent, taxes, etc., and as no objection was made to them either in argument or briefs they may be allowed, except the item of costs, *i. e.*, $4,409.65, with interest from June 2, 1897, and $500.00 with interest from February 28, 1896.

Peter G. Thomson claims $1,600.00 on a demand note of October 24, 1890. The shareholders had unanimously resolved to advance $300.00 per share to assist the syndicate, and this was done; $100.00 per share was paid back, leaving $200.00 per share outstanding, being for $1,600.00 for the eight shares owned by him.

He also presents a claim for $350.00 with interest from April 18, 1893, on an advance to the trustees made December 13, 1892.

These claims are not disputed and are allowed, but only as off-sets against Mr. Thomson's liability.

Joseph Taylor's claim is also on the stockholders' loan of October
24, 1890, and is therefore allowed, not as a claim, but as an
43 off-set against his liability.

Fifth National Bank's Claim.

This claim arises out of M. A. Spencer's contribution or loan of $200.00 per share for three shares, the same as Joseph Taylor's and Peter G. Thomson's claims, and should be considered as an offset against M. A. Spencer's liability.

On November 18, 1895, the two trustees, of whom M. A. Spencer was one, took up M. A. Spencer's $600.00 claim by two notes, aggregating that amount with interest ($182.50) viz., one for $400.00 and one for $382.50, signed by the trustees to Spencer's order, and he transferred them to the bank as collateral to a debt of a greater amount of the M. A. Spencer Company and in consideration of an extension of time.

These new notes were unauthorized, for the syndicate owed Spencer nothing, and the notes being made by agents to one of their own number, carried on their face notice of their invalidity. This claim is disallowed.

Claim of E. R. Donohue and C. H. Avery, Receivers of Emperor Building and Loan Company.

On February 27, 1891, the trustees mortgages ten lots to the Emperor Building & Loan Company for $10,000.00 loan. A foreclosire suit was brought by the receivers of the building society in the Common Pleas Court (suit No. 114249) against the trustees and shareholders, in which all the latter, except Joseph E. Brown, John Woltz and Henry L. Taylor were served with summons.

On November 30, 1898, a decree was rendered finding there w due from the trustees, $7,778.65, with interest on $7,577.05 fro September 15, 1895, finding the mortgage to have been execut

and decreeing that unless this amount was paid within thirty days an order of sale should issue, and continuing the question of the liability of the other defendants until after sale. No sale has been effected.

I find that by the original deed of trust the trustees had
44 not been given power to bind the shareholders by mortgaging or borrowing and had no such implied power as partners in a concern of this kind; that a shareholders' regular monthly meeting, held December 1st, 1890, attended by Thomson, McFarlan, Fisher, Meier, Lippelman, Taylor, Kinsinger, Wehrmann, McArdle and Spencer, authorized the trustees to contract for loans not exceeding $20,000.00 and give mortgage to secure same.

On December 24, 1900, the trustees executed a mortgage for $10,000.00 to the Germania No. 2 Loan & Building Company, which was cancelled November 21, 24, 1894, and on February 27, 1891, this mortgage to the Emperor was made.

Assuming—for the minutes are silent—that these mortgage- were made under the above resolution, yet it cannot be said that shareholders present at a meeting can bind absentees for a personal responsibility not authorized by the partnership relation.

Whether they bind themselves individually is not a question with which we are concerned here. The claim is not a partnership debt and is disallowed.

Claims on Title Bonds and Deeds.

I find that the owners of title bonds and deeds are entitled to hold liable all defendants who were members of the syndicate at the date of execution of each and since. The amount of liability is the amount paid by each, with interest from the time of eviction, which is June 15, 1896, being the date of the United States Marshal's deed. But holders of deeds are not entitled to recover taxes paid by them, the same being in law offset by the use and occupation; and for the same reason holders of title bonds are not entitled to interest on payments prior to extinguishment of title.

I find that although by the terms of the trust deed the Cleneay title could have been extinguished at $500 per lot and conceding that the title bondholders could at all times have paid that amount to the Cleneays direct, and conceding that the Cleneays were at all times ready to convey at $500 per lot, yet the title bondholder
45 is not compelled to extinguish the paramount title. If he does not he can recover the money paid, but if he does, he can only recover the loss.

Hence, while I find that Julia Murphy received a title bond on July 31, 1889, and paid on it $740.00 up to October 5, 1895, her total payment was to have been $1,250.00. She acquired title by purchase from the Cleneays for $500.00, and hence is not entitled to recover anything.

William H. Martin received two title bonds calling for $1,250.00 each, one dated, September 9, 1889, on which he paid $1,027.00 to February 3, 1896, and on the other he paid $1,015.00 to the same

date. His daughter acquired the Cleneay title for $1,000.00, but I find that she was a member of his family and that at least part of the purchase money came from him, and the purchase was a family arrangement that could be charged to him, and hence he is entitled to recover only $510.00 with interest from June 15, 1896.

As to David Spritz's title bonds I find that he paid up to February, 1894, and then stopped, but had paid more than the one-third entitling him to a deed. Although such cessation of payment might be fatal to a claim for specific performance, yet in view of the then condition of the syndicate his continuance of payment would not have avoided the catastrophe, and the amount of his payments should not be forfeited. His claim is therefore allowed.

Following are the dates of execution of, and amounts paid upon, the other title bonds and deeds.

1889,	May 10.	The Misses Voll	$1540
	27.	E. A. Sherman	611
	27.	F. Tuchfarber	639
	28.	C. Bohnert	810
	28.	John M. Jameson	630
	June 1.	Louise V. Stewart	1135
	12.	David Spritz	1939
	22.	M. L. Armstrong	1110
	22.	A. A. Stubbs	1060
	August 12.	Alice G. Hunt	876
1890,	July 3.	Alice Jones	1250
	15.	C. Emmeluth	1250
	August 18.	George Gunckel	1000

As to the Debtors.

I find the following to be the original and successive shareholders of the syndicate, arranged chronologically:

46

No.	Date.	Name.	Transfer.
	1889.		
1.	April 1.	M. A. Spencer	
2.	" 1.	M. A. Spencer	Nov. 13, '93 to No. 78.
3.	" 1.	M. A. Spencer	M'ch 9, '93 to No. 75.
4.	" 1.	John Woltz	July 2, '89, to W. F. Wehrmann (See Min. p. 11.)
5.	" 1.	John Woltz	Sep. 10, '91, to No. 54.
6.	" 1.	John Woltz	Jun- 27, '90, to No. 42.
7.	" 1.	John Woltz	Tr. to W. F. Wehrmann, July 2, '89 (See Min. p. 11)
8.	" 1.	John Woltz	Tr. to W. F. Wehrmann, July 2, '89 (See Min. p. 11)

9.	"	1.	Josiah E. Brown	M'ch 14, '92 to No. 68.
10.	"	1.	R. Gohs	Jun- 27, '90 to No. 44.
11.	"	1.	R. Gohs	Jun- 27, '90 to No. 43.
12.	"	1.	R. Gohs	Jun- 27, '90 to No. 45.
13.	"	1.	Jno. Brocamp	Dec. 17, '90 to No. 51.
14.	"	1.	Jno. Brocamp	Jun- 27, '90 to No. 46.
15.	"	1.	Jno. Brocamp	M'ch 14, '92, to No. 69.
16.	"	1.	F. B. McFarlan	Jan. 15, '92 to No. 59.
17.	"	1.	F. B. McFarlan	Jan. 15, '92 to No. 60.
18.	"	1.	F. B. McFarlan	Jan. 15, '92 to No. 61.
19.	"	1.	F. B. McFarlan	Jan. 15, '92 to No. 62.
20.	"	1.	Jas. McArdle	
21.	"	1.	Jos. Taylor	
22.	"	1.	H. W. Meier	Dec. 8, '90, to No. 50.
23.	"	1.	H. H. Lippelman	M'ch 30, '94 to No. 86.
24.	"	1.	H. D. Brown	Sept. 10, '91 to No. 55.
25.	"	1.	Rebecca K. Brown	Jun- 27, '90 to No. 47.
26.	"	1.	Gertrude Marcus	Jun- 27, '90 to No. 48.
27.	"	1.	John W. Fisher	Jan. 29, '92 to No. 65.
28.	"	1.	John W. Fisher	Jan. 29, '92 to No. 66.
29.	"	1.	Anna L. McFarlan	Jan. 29, '92 to No. 67.
30.	"	1.	John M. Bolan	Dec. 24, '89 to No. 41.
31.	"	1.	Peter J. Dunn	
32.	"	1.	Woltz & Williamson	Jun- 27, '90 to No. 49
33.	"	1.	Philas J. Woltz	Dec. 17, '90 to No. 52.
34.	"	1.	Philas J. Woltz	Dec. 17, '90 to No. 53.
35.	"	1.	Gertrude Spencer	Sept. 10, '91 to No. 56.
36.	"	1.	Geo. M. A. Spencer	Sept. 10, '91 to No. 57.
37.	"	1.	Wm. F. Wehrmann	
38.	"	1.	H. L. Taylor	M'ch 14, '92 to No. 70.
39.	"	1.	Benj. F. Erhmann	May 2, '89, to John Woltz; June 21, '89 to A. T. Voll (See Min., p. 11.)
40.	"	1.	J. E. Brown and John Woltz	Sept. 10, '91 to No. 58.
41.	Dec. 24. 1890.		F. B. McFarlan	Jan. 15, '92 to No. 63.
42.	June 27.		P. G. Thomson	M'ch 27, '94 to No. 84.
43.	" 27.		P. G. Thomson	M'ch 27, '94 to No. 85.
44.	" 27.		P. G. Thomson	
45.	" 27.		P. G. Thomson	M'ch 27, '94 to No. 79.
46.	" 27.		P. G. Thomson	M'ch 27, '94 to No. 80.
47.	" 27.		P. G. Thomson	Mar. 27, '94 to No. 81.
48.	" 27.		P. G. Thomson	M'ch 27, '94 to No. 82.
49.	" 27.		P. G. Thomson	M'ch 27, '94 to No. 83.
50.	Dec. 8.		F. B. McFarlan	Jan. 15, '92 to No. 64.
51.	" 17.		Krohn, Feiss & Co.	Jan. 16, '95 to No. 64.
52.	" 17.		Krohn, Feiss & Co	Jan. 16, '95 to No. 90.
53.	" 17.		Krohn, Feiss & Co	Jan. 24, '93 to No. 72.
54.	Sept. 10.		C. Kinsinger	M'ch 9, '93 to No. 77.
55.	" 10.		C. Kinsinger	M'ch 9, '93 to No. 76.

56. " 10. C. Kinsinger.....Feb. 14, '93 to No. 74.
57. " 10. C. Kinsinger.....Feb. 2, '93 to No. 73.
58. " 10. C. Kinsinger.....Jun- 17, '92 to No. 71.

1892.

59. Jan. 15. W. W. Brown, trustee.....Aug. 27, '96 to No. 91.
60. " 15. W. W. Brown, trustee.....Aug. 27, '96 to No. 92.
61. " 15. W. W. Brown, trustee.....Aug. 26, '96 to No. 93.
62. " 15. W. W. Brown, trustee.....Aug. 27, '96 to No. 94.

47

1892.

63. Jan. 15. W. W. Brown, Trustee.....Aug. 27, '96 to No. 95.
64. " 15. W. W. Brown, Trustee.....Aug. 27, '96 to No. 96.
65. " 15. W. W. Brown, Trustee.....Aug. 27, '96 to No. 97.
66. " 15. W. W. Brown, Trustee.....Aug. 27, '96 to No. 98.
67. " 15. W. W. Brown, Trustee.....Aug. 27, '96 to No. 99.
68. M'ch 14. Richard Hempel.....
69. " 14. Richard Hempel.....
70. " 14. Richard Hempel.....
71. June 15. William Bell.....

1893.

72. Jan. 24. Benj. Pritz.....
73. Feb. 2. Wm. Bell.....Aug. 27, '94 to No. 87.
74. " 14. Wm. Bell.....Aug. 27, '94 to No. 88.
75. M'ch 9. J. M. Armstrong.....
76. " 9. J. M. Armstrong.....
77. " 9. J. M. Armstrong.....
78. Nov. 13. W. A. R. Tenney.....

1894.

79. M'ch 27. Wm. Bell.....
80. " 27. Wm. Bell.....
81. " 27. Wm. Bell.....
82. " 27. Wm. Bell.....
83. " 27. Wm. Bell.....
84. " 27. Wm. Bell.....
85. " 27. Wm. Bell.....
86. " 30. J. Fred Woltz.....
87. Aug. 27. W. B. Kennedy.....
88. " 27. W. B. Kennedy.....

1895.

89. Jan. 16. Moses Krohn.....
90. " 16. Leopold Feiss.....

1896.

91. Aug. 27. J. Fred Woltz and Wm. Bell...
92. " 27. J. Fred Woltz and Wm. Bell...
93. " 27. J. Fred Woltz and Wm. Bell...
94. " 27. J. Fred Woltz and Wm. Bell...
95. " 27. J. Fred Woltz and Wm. Bell...
96. " 27. J. Fred Woltz and Wm. Bell...
97. " 27. J. Fred Woltz and Wm. Bell...
98. " 27. J. Fred Woltz and Wm. Bell...
99. " 27. J. Fred Woltz and Wm. Bell...

I further find that Adam T. Voll's share (No. 39 on the above table) really belonged to Wm. F. Wehrmann, and hence that both are liable upon that share.

I further find that the shares taken in the name of Gertrude Marcus (No. 26), Rebecca D. Brown (No. 25) and Gertrude A. Spencer (No. 35) were taken in their names by their respective husbands without their knowledge and without subsequent ratification by them, and that the husbands are (although Mrs. Brown's answer admits ownership) alone liable, viz: Michael Marcus, Josiah Brown and Myron A. Spencer.

That W. W. Brown, Trustee, held the shares standing in his name as trustee for the Merchants National Bank; that the vice-president of the bank actively participated in the management of the
48 syndicate, and that said bank was the owner thereof and is liable.

That the shares in the name of Richard Hempel had been pledged by John Woltz to the Second National Bank and were afterwards transferred to said Hempel to hold for John Woltz.

That the share in the name of George M. A. Spencer was subscribed in his name without his consent by M. A. Spencer, and that he did not ratify this and M. A. Spencer is alone liable thereon.

That accordingly Gertrude Marcus, Rebecca D. Brown, Gertrude Spencer, George M. A. Spencer, the Second National Bank and W. W. Brown, trustee, should be dismissed.

That the estate of Peter G. Dunn had been wound up without presentation of any claim under the syndicate and that his executrix is not liable, except so far as any discovery of any future assets would make her so.

That the share in the name of W. A. R. Tenney was put in his name as security for a debt by M. A. Spencer and shortly thereafter was returned to him by M. A. Spencer, and that he so informed the Secretary of the syndicate, but no re-transfer was made on the books, and hence that he is entitled to recourse on M. A. Spencer for any expenditure he may be compelled to make as shareholder.

The following is a résumé of the creditors and debtors:

The first table being a list of creditors with original amounts, date from which interest begins, the amounts of interest to January 1st, 1900, and the totals to that date.

The second table is a list of the original shareholders in column with successive columns arranged by dates of transfer, the dates being at the head of the columns and the name of each transferee in the columns and opposite the transferrer's names.

The form of judgment recommended is submitted on a separate sheet.

Respectfully submitted,

CLEMENT BATES,
Special Master.

January 15, 1900.

49 EXHIBITS.

EXHIBIT "1."

This Indenture of Lease, made this 13th day of February, A. D. 1889, between Joseph S. and G. W. B. Cleneay of Hamilton County, Ohio, lessors, and John Woltz, of same place, lessee, witnesseth: That said lessors for and in consideration of the sum of sixty-five thousand ($65,000) dollars to them in hand paid, and of the rents herein reserved, and covenants and agreements hereinafter contained, and by the said lessee, his heirs, executors, administrators and assigns, to be paid and performed, do hereby grant, lease and demise unto the said lessee his heirs, executors, administrators and assigns, all the following described real estate, to-wit: The following described tract of land situated in section thirty-three (33) in Columbus Township, Hamilton county, Ohio, described as follows: "Commencing at the southeast corner of Regent avenue and Locust street; thence running east on the south line of said Locust street to a point where Locust street interse-ts a tract of land known as the 'Bolser Land;' thence south on the west line of the 'Bolser Land' to the Duck Creek road, thence in a southwesterly direction with the Duck Creek road to the south line of the land owned by the said lessors in section thirty-three (33); thence west on said south line to Regent Avenue; thence north on the east line of Regent Avenue to the place of beginning, containing one hundred and sixty (160) acres more or less;" it being understood and agreed by the parties hereto that the object of the foregoing description is to cover all the land owned by said lessors in said section thirty-three that lies east of Regent avenue; subject, however, to a contract made by lessors in regard to dedication of land for Floral avenue and to the rights of the Ohio & Northwestern Railroad.

To have and hold the same, together with the privileges and appurtenances thereunto appertaining and belonging, unto the said lessee, his heirs, executors, administrators and assigns, for and during the full term of ten (10) years next ensuing from the date of this lease, on the 12th day of February, A. D. 1899, fully to
50 be completed and ended. Lessors are to receive the revenues or rents arising from said land up to March 1, 1889. It is agreed that a mortgage at present outstanding on twelve (12) acres of land not exceeding twelve thousand ($12,000) dollars may remain on said property until such time as said lessee may require a deed for the land unencumbered. Lessors hereby agree to join said lessee in any plat that he may make of the premises hereby conveyed, or do any act required of them by said lessee to make a legal dedication of the streets so platted to public use provided said streets are to be afterwards included in the lots to be conveyed at the rate of two thousand ($2,000) — per acre, as stipulated below.

The said lessee, his heirs, executors, administrators and assigns, yielding and paying therefor, yearly, and every year during this demise, the sum of eight thousand dollars, payable in equal quarterly installments of two thousand ($2,000) dollars on the thirteenth days of the months of May, August, November and February, of each and every year during the term of this lease. And the said lessee,

for himself, and for his heirs, executors, administrators and assigns, does hereby covenant and agree to and with the said lessors, their heirs, and assigns, that he will well and truly pay unto the said lessors, their heirs and assigns, the yearly rent above reserved, at the days and times and in the manner above specified; and further, that he will, in addition to the rent aforesaid reserved, pay all taxes, rates, charges and assessments that may at any time during this demise, be levied, rated, charged or assessed on said premises or any part thereof, for any purpose whatsoever; and that for the better securing the payment of said rents, and the performance of the covenants herein contained, by the said lessee to be kept and performed, the said lessors, their heirs and assigns, shall have a first lien, paramount to all others, upon every right and interest of the said lessee, to or in the above described premises; and further, the said lessee, his heirs or assigns, will not commit or suffer any waste upon said premises, and that he will, at the expiration of said term, or sooner determination of this lease peaceably and quietly
51 deliver up said premises to the said lessors their heirs or assigns. Lessors are to pay all taxes up to and including the year 1888, and the lessee is to pay all taxes subsequent to that tax.

And the said lessors, for themselves and for their heirs, executors, administrators and assigns, further covenant and agree to and with the said lessee, his heirs, and assigns, that (all rents, taxes and assessments being paid, and all covenants, being performed by said lessee, as herein stipulated) said lessors will, at any time during the continuance of this lease, convey the said premises to said lessee, his heirs and assigns, by a good and sufficient deed of general warranty, with release of dower, upon the payment to them by said lessee, his heirs or assigns, of the sum of two hundred thousand ($200,000) dollars. It is further understood and agreed between the parties hereto that said lessors are to execute and deliver to said lessee or his assigns warranty deeds for all or any part of the herein described lands as the said lessors shall receive pay therefor and the said lessee may designate; provided, that at no time shall said lessors be required to execute deeds for more lots or parcels of land than they will have received pay for at the rate of two thousand ($2,000) dollars per acre, including streets, not including the said cash payment of sixty-five thousand ($65,000) dollars, and any such payments so made on any lots or parcels of land shall be credited on the purchase price of two hundred thousand ($200,000) dollars herein mentioned, and the ground rent is to abate in the proportion borne by said payments to said purchase price of two hundred thousand ($200,000) dollars. It is agreed that lessors are to complete all the streets now laid out on the Cleneay subdivision of forty acres adjoining on the west the tract herein leased, to macadamize and grade said streets and to lay plank walks on one side thereof similar to those now laid on Cleneay avenue in said subdivision, the same to be completed by July 1st, 1889, except Regent avenue, which lessors are to grade and pay one-half of cost of gravel and macadam thereon and lay a sidewalk on the west side thereof. Lessors are not to sell, lease or otherwise dispose of any lots remaining unsold in said forty acre tract for a lower figure than seventeen ($17)

52 dollars per front foot; while said lease is in force lots to be sold at this rate are to be the same size as already platted.

Provided, however, and these presents are upon these express conditions, that if, at any time, during this demise, the rent aforesaid reserved, or any part thereof, shall be in arrear, or unpaid, in all or in part, for the space of thirty (30) days after the same shall have become due and payable, and after demand of payment made personally on said premises, which demand of payment shall be equally good and effective, whether made on the day of payment, or any time afterward; or, if the said lessee, his heirs, executors, administrators or assigns, shall fail to pay all taxes, rates, charged and assessments, that may at any time during this demise be levied, rated, charged or assessed on said premises as the same may be required, or if the lessee, his personal representatives, heirs and assigns, shall faithfully to keep and perform any other covenant or agreement herein contained, and by him or them to be kept and performed, that then or in either such case, this lease shall cease, determine and be void; and it shall and may be lawful for the said lessors, their heirs, executors, adminstrators or assigns, to enter upon the said premises with the appurtenances, or any part thereof, in the name of the whole, and the same to occupy and repossess as though this demise had not been made, and the said lessee, his heirs and assigns, and all others claiming under him or them, from thence utterly to expel, remove and put out, anything in these presents contained to the contrary thereof notwithstanding.

And the said lessors, for themselves and for their heirs and assigns, do, hereby covenant and agree to and with the said lessee, his heirs and assigns, that, upon the payment of the rents and the performance of the covenants aforesaid, said lessee shall and may peaceably and quietly have and enjoy the aforesaid premises, with the appurtenances, for and during the term aforesaid, free from any let or hindrance by said lessors, their heirs or assigns, or any person or persons whatsoever.

In witness whereof, the said parties to these presents have hereunto set their hands, and to a duplicate hereof, the day and
53 year first above written, as also has Elizabeth H. Cleneay, wife of said G. W. B. Cleneay, who hereby releases her right and expectancy of dower in the said premises, the said Joseph S. Cleneay being an unmarried man.

JOSEPH S. CLENEAY.
GEORGE W. B. CLENEAY.
ELIZABETH H. CLENEAY.
JOHN WOLTZ.

Signed and acknowledged in presence of us:

KATE CLIFFORD,
As to Joseph S. Cleneay, George W. B. Cleneay and Elizabeth H. Cleneay.

W. S. ROWE,
As to Joseph S. Cleneay, George W. B. Cleneay and John Woltz.

H. Q. CLENEAY, As to All.

Endorsed on back: "Presented for record on the 13th day of February, 1889, at 4.50 o'clock p. m. Recorded February 14th, 1889, in Lease Book No. 92, page 104.

"GEORGE HOBSON,
County Recorder."

EXHIBIT "2."

Know all men by these presents: That John Woltz and Phillas J. Woltz, his wife, both of Hamilton County, in the State of Ohio, in consideration of one hundred thousand dollars to him paid by M. A. Spencer, James McArdle, Jr., and Frank B. McFarlan, trustees, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell and convey to the said M. A. Spencer, James McArdle, Jr., and Frank B. McFarlan, trustees, their successors and assigns forever, "the following described tract of land situated in the section thirty-three (33) in Columbia Township, Hamilton County, Ohio, descrived as follows, viz: Commencing at the southeast corner of Regent avenue and Locust street; thence running east on the south line of said Locust street to a point where Locust street intersects a tract of land known as the 'Bolser land'; thence south on
54 the west side of the 'Bolser Land' to the Duck Creek road; thence in a southwesterly direction with the Duck Creek road to the south line of the land owned by the said lessors in section thirty-three (33); thence west on said south line to Regent Avenue, thence North on the east line of Regent Avenue to the place of beginning, containing one hundred and sixty (160) acres, more or less. It being understood and agreed by the parties hereto that the object of the foregoing description is to cover all the land owned by said lessors in said section thirty-three that lies east of Regent Avenue, subject, however, to a certain contract made by lessors in regard to dedication of land for Floral avenue and other rights of the Ohio & Northwestern Railroad."

The foregoing tract of land being the same as that conveyed to said John Woltz by Joseph S. and G. W. B. Cleneay by lease dated the 13th day of February, 1889, and recorded on the records of Hamilton County, Ohio, on page 104 in Lease Book No. 92. And all the estate, title and interest of the said John Woltz and Phillas J. Woltz, his wife, either in law or in equity, of, in and to the said premises, together with all the privileges and appurtenances to the same belonging, and all the rents, issues and profits thereof, to have and to hold the same to the only proper use of the said M. A. Spencer, James McArdle, Jr., and Frank B. McFarlan, trustees, their successors and assigns, forever. And the said John Woltz, for himself and for his heirs, executors and administrators, does hereby covenant with the said M. A. Spencer, James McArdle, Jr., and Frank B. McFarlan, trustees, their successors and assigns, that he is the true and lawful owner of the said premises and has full power to convey the same; that the title so conveyed is clear, free and unencumbered; and further, that he will warrant and defend the same against all claim or claims of all persons whomsoever, subject,

nevertheless, to all the rents, covenants, conditions and agreements, contained in a certain indenture of lease dated the 13th day of February, 1889, made by said Joseph S. Cleneay and G. W. B. Cleneay, to said John Woltz of the said tract of land hereinbefore described and conveyed, to be paid, kept and performed.

In Witness Whereof, the said John Woltz and Phillas J.
55 Woltz, his wife, who hereby releases her right and expectancy of dower in said premises, have hereunto set their hands this 15th day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

JOHN WOLTZ.
PHILLAS J. WOLTZ.

Signed and acknowledged in presence of us:
I. S. GROSS.

Witness to signature John Waltz and Phillas J. Woltz,
J. E. BROWN.

STATE OF OHIO, *County of Hamilton, ss:*

Be it remembered that on the 16th day of February, in the year of our Lord one thousand eight hundred and eighty-nine, before me the subscriber, a notary public in and for said county, personally came John Woltz and Phillas J. Woltz, the grantors in the foregoing deed, and acknowledged the signing thereof to be their voluntary act, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my notarial seal on the day and year last aforesaid.

J. E. BROWN,
[SEAL.] *Notary Public.*

Endorsed on back: "Presented for record on the 16th day of February, 1889, at 3:50 o'clock p. m. Recorded February 27, 1889, in Deed Book No. 668, page 1. "George Hobson, "County Recorder."

EXHIBIT "3."

This indenture made this 11th day of March, 1889, by and between Myron A. Spencer, Frank B. McFarlan, James McArdle, Jr., John Woltz, W. F. Wehrmann, H. L. Taylor, Gertrude Spencer, G. A. Spencer, Phillas J. Woltz, P. J. Dunn, J. M. Bolan, Anna L. McFarlan, J. W. Fisher, Gertrude Marcus, R. K. Brown, H. D. Brown, H. H. Lippelman, H. W. Meier, Joseph Taylor, John
56 Brokamp, Rudolph Gohs, J. E. Brown, A. W. Williamson, the same being all the members of the Elsmere Syndicate, parties of the first part, and Myron A. Spencer, Frank B. McFarlan and James McArdle, Jr., trustees, of the said Elsmere Syndicate, parties of the second part, all of said parties being residents of Hamilton County, State of Ohio, witnesseth:

Whereas, the said parties of the second part are the owners of a

certain leasehold estate as trustees, said property being hereinafter fully described and the same being recorded in Book 92, page 104, Hamilton County Records.

And, whereas, it is the intention of the said parties of the second part, (trustees) to plat, subdivide, lease, sell and convey the said property:

And whereas, the said parties of the first part are interested in the proceeds arising from the sale of said property and the issues, rents, and profits of the same;

And, whereas, it is the intention of the parties of the first part, and they do hereby declare, that the parties of the second part shall have full power and authority to plat, subdivide, improve sell, lease or convey said property by signing their names as trustees, and without our joining with them in any sale, lease or contract, and that they have the further right to collect all rents, profits and issues arising from and out of the sale of renting of said property.

Now therefore, this indenture witnesseth that the said parties of the first part, by this declaration of trust, do hereby declare that the said parties of the second part have all the rights, privileges and and powers above mentioned, and the said parties of the first part do hereby exempt from all liability any person or persons who may deal with the parties of the second part from any loss, if any should come, from the wrongful conversion of any funds in the hands of said parties, and in which we are interested. And the said parties of the first part, for themselves, their heirs and assigns, for the further protection of all the purchasers of said property, do in consideration of the premises above and in consideration of certificates designating and defining the number of shares in said syndicate to which
57 each of us is entitled, issued to us by the parties of the second part, the receipt of which is hereby acknowledged, hereby grant, bargain, sell and convey to the said parties of the second part, their successors or assigns, forever, all our interest in and to the rents, issues and profits arising from, as well as our interests in said property, which is hereby described as follows:

Situate in section thirty-three (33), Columbia township, Hamilton County, Ohio, commencing at the southeast corner of Regent avenue and Locust street; thence running east on the south line of said Locust street to a point where Locust street intersects a tract of land known as the "Bolser Land;" thence south on the west line of the "Bolser Land" to the Duck Creek road; thence in a southwesterly direction with the Duck Creek road to the south line of the land owned by Joseph S. Cleneay and G. W. B. Cleneay in section thirty-three; thence west on said south line to Regent avenue; thence north on the east line of Regent avenue to the place of beginning, containing one hundred and sicty acres, more or less, and all the estate, title and interest of the said parties of the first part, either in law or equity of, in and to the said premises, together with all the privileges and appurtenances to the same belonging and all the rents, issues and profits thereof. To have and to hold said rents, issues and -rofits and moneys derived from the sale of said property

in trust, nevertheless, to and for the several uses, intent and purposes hereinafter mentioned, namely:

First. To pay for surveys, plats, subdivisions and all other expenses for improvements necessary for the selling and leasing of said property.

Second. To pay the purchase money for said property as provided by said lease to the said parties of the second part at such times and in such installments as in said lease set forth.

Third. To pay the balance of said fund so realized to the holders of the said certificates so issued, by the parties of the second part, in proportion to the number of shares held by each.

This trust shall expire when all of said property has been leased or sold and the money for same has been distributed, as above
58 set forth.

And the said parties of the second part do hereby signify their acceptance of this trust, and do hereby covenant and agree to and with the said parties of the first part faithfully to discharge and execute the same according to the true intent and meaning of these presents.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

[SEAL.]	M. A. SPENCER.
[SEAL.]	F. B. McFARLAN.
[SEAL.]	J. W. McARDLE, Jr.
[SEAL.]	G. A. SPENCER.
[SEAL.]	GERTRUDE SPENCER.
[SEAL.]	JOSEPH TAYLOR.
[SEAL.]	JOHN M. BOLAN.
[SEAL.]	JOHN WOLTZ.
[SEAL.]	HENRY L. TAYLOR.
[SEAL.]	H. H. LIPPELMANN.
[SEAL.]	R. GOHS.
[SEAL.]	J. E. BROWN.
[SEAL.]	A. W. WILLIAMSON.
[SEAL.]	WM. F. WEHRMANN.
[SEAL.]	JOHN BROKAMP.
[SEAL.]	JOHN W. S. FISHER.
[SEAL.]	PETER J. DUNN.
[SEAL.]	REBECCA K. BROWN.
[SEAL.]	H. D. BROWN.
[SEAL.]	PHILLAS J. WOLTZ.
[SEAL.]	GERTRUDE MARCUS.
	Per M. MARCUS, *Attorney.*
[SEAL.]	H. W. MEIER.
[SEAL.]	ANNA L. McFARLAN.

Signed, sealed and acknowledged in the presence of us:
C. V. JAQUITH.
GEO. W. HARDING.
Witnesses.

(Duly acknowledged.)

Endorsed on back: "Transfer not necessary. Fred. Raine, Auditor; per Ziegler. Received for record December 16, 1889, at 4:25 p. m. Recorded December 17, 1889. Deed Book 684, page 362. "George Hobson, County Recorder."

EXHIBIT "4".

Agreement.

We, the undersigned, in consideration of the mutual agreements herein contained, severally agree, as follows:

First. That we will form a syndicate with a capital stock of
59 $320,000, divided into 40 shares, of par value of $8,000.00 each, and we will take the shares as subscribed by us.

Second. With said capital stock it is agreed to purchase a certain tract of land lying in Section No. 33, Columbia Township, Hamilton Co., Ohio, as per plat hereunto attached, said tract containing 160 acres, more or less, the purchase price for same to be $300,000.00, payable $100,000.00 cash, and the balance ($200,000.00) on ten-year 4% ground rent, with privilege of purchase at any time, interest payable quarterly.

Third. The balance of said capital stock, amounting to $20,000.00 shall be used for the improvement and development of said land, and for the expenses incidental to the management, control and sale thereof.

Fourth. The shares of said stock are to be paid for as follows: The sum of $300.00 per share immediately on signing this agreement; the sum of $2,300.00 immediately after all shares are taken; the sum of $400.00 in sixty days after all shares are taken; the balance of $5,000.00 on each share to be paid out of the proceeds of lots.

Fifth. After the cost of land, including the cost of making streets, advertising, etc., etc., shall have been paid out of the receipts for the sale of lots, then the receipts will be considered net profits, and shall be divided among the shareholders equally, share and share alike.

Sixth. Subscriptions to be binding only in case all the 40 shares are taken within fifteen days from date hereof. Otherwise, said first payment of $300.00 on each share to be returned.

Cincinnati, Ohio, January 25th, 1889.

Name.	No. shares.	Amount.	Paid.
M. A. Spencer	Three	24000	900
John Woltz	Five	40000	1500
J. E. Brown	One	8000	300
Rudolph Gohs	Three	24000	900
John Brokamp	Three	24000	900
James McArdle	One	8000	300
F. B. McFarlan	One	8000	300
Joseph Taylor & Co	One	8000	300
H. W. Meier	One	8000	300
H. H. Lippelmann	One	8000	300

	H. D Brown	One	8000	300
	Rebecca K. Brown	One	8000	300
60	F. B. McFarlan	One	8000	300
	Gertrude Marcus, Per M. Marcus, Att'y	One	8000	300
	J. E. Fisher	Two	16000	600
	F. B. McFarlan	One	8000	300
	Anna L. McFarlan, by F. B. McFarlan, Att'y	One	8000	300
	Jno. M. Bolan	One	8000	300
	Peter J. Dunn	One	8000	300
	Woltz & Williamson	One	8000	300
	Phillas J. Woltz	Two	16000	600
	Gertrude A. Spencer	One	8000	300
	Geo. M. A. Spencer	One	8000	300
	Wm. F. Wehrmann	One	8000	300
	F. B. McFarlan	One	8000	300
	H. L. Taylor	One	8000	300
	Benjamin F. Wehrmann	One	8000	300
	Brown and Woltz	One	8000	300

61 EXHIBIT "6*a*."

The Elsmere Syndicate.

Investment, $320,000. Paid-up, $120,000.

No. —. Non-assessable.

This is to certify that —— —— is the owner of a 1/40 interest in The Elsmere Syndicate. Transferable in person or by attorney upon the books of the Syndicate at its office in the City of Cincinnati, upon the surrender of this Certificate.

Witness our hands this — day of ——.

—— ——,
—— ——,
—— ——,
Trustees.

Countersigned.

—— ——,
Secretary and Treasurer.

For value received, —— —— sells to —— —— the interest above mentioned, and authorizes —— ——, attorney, to transfer the same on the books of the company.

In presence of

—— ——,
—— ——.

By-laws of The Elsmere Syndicate.

The Officers.

The officers shall consist of a President, Vice-president, Secretary, Treasurer and three trustees. The present trustees shall remain in office during the life of the Syndicate, unless impeached for wrong-doing, by a majority in interest of all the *un*mbers; or if one or more should resign or die, then the place or places, in any event, made vacant, to be filled by a majority in interest.

The President.

The president shall preside at all meetings of the Syndicate, and in his absence that duty shall devolve on the Vice-President.

62 The Secretary.

The secretary shall keep a record of all the meetings of the Syndicate and its trustees; keep the accounts of the Syndicate and perform such other duties as the Trustees may from time to time require of him. He shall receive a salary of $50 per month, payable monthly.

(Page 8.)

The Treasurer.

The Treasurer shall collect and receive all moneys of the Syndicate, and pay out the same only on the order in writing of a majority of the Trustees. He shall at all times keep his books open to the inspection of the Trustees, and shall render to them an itemized statement of his receipts and expenditures at least once in each and every month, and oftener if required, and shall perform such other duties as may be required of him by the Trustees. He shall give bond for the faithful discharge of his duties and proper accounting of monies coming into his hands in the sum of $50,000, with security to be approved by the Syndicate.

The Trustees.

The Trustees shall have all the powers given them by and through a "Declaration of Trust" heretofore made and signed; they shall sign all orders for the payment of money; make and execute all contracts of the Syndicate in its behalf; hold all official bonds given by officers and others to the Syndicate, and have general supervision over the affairs of the Syndicate, with power to employ counsel at a reasonable fee, and contract with agents for the sale of the Syndicate property. They shall receive a salary of $500 each, the year commencing May 1, 1889, unless the sales of property of the Syndicate during said year (beginning May 1, 1889 and ending

(Page 9.)

May, 1890) shall exceed $400,000, in which event their salary shall be $1,000 each instead of $500. Their salary for subsequent years shall be fixed at each annual meeting of the Syndicate.

Meetings of the Members.

63 Annual meetings of the Syndicate shall be held on the first Monday in April in each year, and such other meetings shall be held from time to time as in the opinion of the Trustees are necessary, or meetings may be called at any time on the request of shareholders representing at least one-third of the shares. The President, Vice-President, Secretary and Treasurer shall be elected at the annual meetings, and such other business may be disposed of at any and all meetings as may be presented. At all meetings each shareholder shall be entitled to one vote for each share of stock held by him and a majority in interest so voting shall govern.

64 *Transcript of Docket and Journal Entries in Circuit Court.*

(Filed in Supreme Court, September 2, 1902.)

May 5, 1902. Minute 183. Judgment entry.

This cause came on for hearing upon appeal from the Court of Common Pleas, upon the transcript, original papers, the report of the master and the evidence, proofs and exhibits offered by the parties, and arguments having been heard and the court having considered the various matters presented by the parties respectively, find:

1st. That what has been called herein the Elsmere Syndicate was a partnership formed for the purpose of taking the title by lease, with privilege of purchase of certain lands situated near Norwood, in this county, owned by George W. B. Cleneay and Joseph S. Cleneay, which was under lease to one John Woltz, who quit-claimed his title to Myron A. Spencer, Frank B. McFarlan and James McArdle, Jr. as trustees for said Syndicate, on or about the 16th day of February, 1889. And that the business of the said syndicate was to subdivide said land into lots, lay out and improve streets, and sell said lots for the profit of the members of the syndicate.

2d. That the interest of the partners in said partnership were represented by certificates of equal interest or shares, forty in number, numbered consecutively from one to forty and transferable from hand to hand on the books of the said company.

3d. That the partnership became insolvent, and it became impossible to carry on further the said business and said partnership was deprived of what remained of said leasehold premises by foreclosure and sale of same, and that it became necessary to file the petition in the court below to wind up the affairs, if any, and to compel the partners to liquidate the indebtedness thereof.

4th. That on June 15th, 1896, the interests in said partnership were held by the following named persons, in the proportion set opposite their names, to-wit:

Myron A. Spencer	Two shares.
William F. Wehrmann estate, Theresa J. Wehrmann, executrix	Five shares.
Merchants National Bank of Cincinnati, Ohio	Nine shares.
James Armstrong's estate, James C. Armstrong, Floris A. Sackett and Isaac B. Matson, executors	Three shares.
Moses Krohn	One share.
Leopold Feiss	One share.
Benjamin Pritz	One share.
Peter G. Thompson	One share.
Joseph Taylor	One share.
Richard Hempel	Three shares.
William Bell	Eight shares.
W. B. Kennedy	Two shares.
J. Fred Woltz	One share.
James McArdle's estate, Margaret McArdle, Adm'x	One share.
Peter J. Dunn's estate, Ella C. Donnell, Ex'x	One share.

being forty in all. That the above named William Bell and W. B. Kennedy are residents of Canada, and have not and could not have been served with process herein, and are not subject to the jurisdiction of the court. That the shares standing in the name of Richard Hempel were not his property, and he is not liable thereon, but one of said shares was conveyed to him by John Brokamp, party hereto, and one of the original subscribers to said syndicate, who is liable thereon. That the share standing in the name of Adam T. Voll, No. 39, was one of the five shares belonging to William F. Wehrmann, and that said Wehrmann was the owner thereof, and that his estate is liable for all assessments thereon, including the amount already paid up by Adam T. Voll, as hereinafter mentioned. That Myron A. Spencer and J. Fred Woltz, above named, and Peter J. Dunn's estate are insolvent and nothing can be made from them. That the others named, including John Brokamp, are liable for the debts of said partnership and the costs of this case, in proportion of the number of shares held by each respectively, but the right to contribution against said Myron A. Spencer and J. Fred Woltz and Peter J. Dunn's estate in favor of the other partners is preserved. That the shares standing in the name of W. W. Brown, trustee, are the shares of the Merchants National Bank, originally held by it as collateral, but transferred to it as owner when they were transferred to said Brown, that when so transferred the notes for which they had been held as collateral were surrendered, and the said shares were entered on the books of the bank as owned by the bank, and so reported to the United States Government, and the bank, through its vice-president, took part in the management of the said syndicate and in the effort to preserve its property from sacrifice and loss, and all this was done with the knowledge
66 and acquies-ence of the board of directors of said bank.

5th. That subject to certain deductions to be made hereinafter mentioned and provided for and including interest up to the

15th day of December, 1901, the indebtedness of said partnership is as follows:

Alfred G. Allen, including interest from February 22, 1896	$86.83
C. B. Matthews, including interest from October 1st, 1898	119.75
Matthews & Cleveland, including interest from May 1st, 1895	104.79
Matthews, Cleveland & Bowler, including interest from March 1st, 1898	90.04
Shroder & Robinson, including interest from July 1st, 1896	477.84
William F. Wehrmann estate, including interest from June 1st, 1897	5610.53
William F. Wehrmann estate, including interest from February 28, 1896	674.00
Peter G. Thompson, including interest from April 18th, 1893	531.12
Peter G. Thompson, including interest from October 24th, 1890	2669.60
Joseph Taylor, including interest from October 24, 1890	333.70
William H. Martin, including interest from June 1, 1896	2720.96
Christina Emmeluth, including interest from June 1, 1896	1665.62
Fifth National Bank	1068.11
The Emperor Building & Loan Co	10316.15
Total	$26469.04

The claim of Joseph S. Cleneay and George W. B. Cleneay is disallowed.

Upon such indebtedness the following named persons are liable for the amount set opposite their names:

Theresa J. Wehrmann, executrix	$5710.66
Merchants' National Bank	10279.12
James Armstrong's estate	3426.42
Moses Krohn	1142.14
Leopold Feiss	1142.14
Benjamin Pritz	1142.14
Peter G. Thompson	1142.14
Joseph Taylor	1142.14
Margaret McArdle, administratrix	1142.14
John Brokamp	200.00
Total	$26469.04

That there is another class of indebtedness of the said partnership to the following:

M. Louis Armstrong, including interest from June 15th, 1896	$1476.30
Caroline Bohnert, including interest from June 15th, 1896	1077.30
Alice G. Hunt, including interest from June 15th, 1896..	1165 08
John M. Jameson, including interest from June 15th, 1896	837.90
Edward A. Sherman, including interest from June 15th, 1896	812.63
David Spritz, including interest from June 15th, 1896...	2578.87

67

Louise V. Stewart, including interest from June 15th, 1896	$1509.55
Adeline E. Stubbs, including interest from June 15th, 1896	1409.80
Fanny Tuchfarber, including interest from June 15th, 1896	849.87
Mrs. Caroline Voll, Stella C. Voll and Mrs. Clara Voll Jameson, including interest from June 15th, 1896.....	2048.20
George Gunckel, including interest from June 15th, 1896	1330.00
Alice Jones, including interest from June 15th, 1896.....	1662.50
Tota-, with interest to Dec. 15, 1901	$16758.00

That upon the last mentioned schedule of indebtedness the following persons have paid the amounts set opposite their names:

Joseph Taylor	$910.00
Adam T. Voll	910.00
J. M. Armstrong's estate	2730.00
Moses Krohn	910.00
Leopold Feiss	910.00
Benjamin Pritz	910.00
McArdle estate	500.00
W. A. R. Tenney	400.00
Michael Marcus	500.00
H. W. Meier	500.00
Peter G. Thompson	1500.00
W. F. Wehrmann estate	1000.00
Total	$11680.00

That the creditors named on the second schedule of indebtedness receiving the above distribution was made as follows:

M. Louise Armstrong	$1029.47
Caroline Bohnert	751.47
Alice G. Hunt	812.24
John M. Jameson	548.29
Edward A. Sherman	564.67

David Spritz	1795.51
Louise V. Stewart	1052.02
Adeline A. Stubbs	983.10
Fanny Tuchfarber	592.64
Mrs. Caroline A. Voll, Stella C. Voll and Mrs. Clara Voll Jameson	1428.27
George Gunkel	927.45
Alice Jones	1459.31
Total	$11680.00

That the parties so paying have received a discharge from all liability upon the shares held by them, from the persons to whom said sums have been paid, to-wit, the creditors named in the second schedule of indebtedness.

That to the creditors receiving the above distribution there was due, with interest to July 1st, 1890, the sum of $15,425.55, but the voluntary payments by Tenney, Marcus and Meier of $400.00, $500.00 and $500.00 respectively, have reduced the second schedule of indebtedness to $14,025.55, which must be provided for by the solvent shareholders (23 shares in number). The above debt, to-wit, $14,025.55 should be apportioned among the shares at the
68 rate of $609.81 per share.

But of these the following shareholders have already paid in excess of that amount, and are entitled to contribution in the following amounts:

Joseph Taylor, one share, having paid $910.00, should receive as contribution	$300.19
Adam T. Voll, one share, having paid $910.00, should receive as contribution	300.19
Armstrong's estate, 3 shares, having paid in $2,730, should receive as contribution	900.57
Moses Krohn, 1 share, having paid $910, should receive as contribution	300.19
Leopold Feiss, — share, having paid $910, should receive as contribution	300.19
Benjamin Pritz, 1 share, having paid in $910, should receive as contribution	300.19
Peter G. Thompson, 1 share, having paid in $1,500 should receive as contribution	890.19
Total excess	$3291.71

The following shareholders, therefore, should pay in all, with interest from July 1st, 1900, to December 15th, 1901, and with interest thereafter, both by way of contribution and upon second schedule of debts:

The McArdle Estate, 1 share, paid $500, should pay into court	$119.42
The Wehrmann Estate, 5 shares, has paid $1,000, and 1 share satisfied by Voll, (see page 3), leaving due on second schedule and as contribution	1565.13
Merchants National Bank, 9 shares, having paid nothing, owes on the second schedule and by way of contribution	5968.47
Total to be paid into court as contribution and on second schedule	$7653.02

When $3,745.55 of said sum, with interest from July 1st, 1900, to December 15th, 1901, to-wit, $4,090.87 shall have been paid into court by the Merchants National Bank, the said sum so paid in shall be applied to the payment of the debts enumerated under the second schedule of debts, as follows:

M. L. Armstrong	$360.41
Caroline Bohnert	263.00
Alice G. Hunt	284.38
John M. Jameson	204.54
Edward A. Sherman	198.38
David Spritz	629.60
Louise V. Stewart	368.51
Adeline A. Stubbs	344.17
Fanny Tuchfarber	207.46
Caroline Voll, Mrs. Clara Voll Jameson and Mrs. Stella C. Voll	499.85
George Gunkel	324.70
Alice Jones	405.87
	$4,090.87

69 And thereafter what remains out of the said sum of $7,653.02, with interest, shall be applied by way of contribution to those shareholders who have paid in excess, so as above set forth, and all sums paid in shall be distributed pro rata to the creditors, except such as are paid as contribution, which shall be distributed to those entitled to contribution as herein found.

The share of stock held in the name of Adam T. Voll, and upon which the said Voll has already paid in $910, being in reality the property of the Wehrmann estate (one of said estate's five shares) the said Wehrmann estate, when it shall have paid Voll $910, with interest from July 1st, 1900, shall be credited with said payment hereinafter credited to said Voll, and shall be entitled to the contribution herein*to*fore set down as due Voll, viz: $300.19; and said Voll having brought suit in case numbered 118632, Hamilton Common Pleas Court, for the recovery of the $910 above mentioned, but no objection having been made to disposing of that matter herein, it is considered that said Adam T. Voll recover of Theresa J. Wehrmann, executrix, $1,005.55, with interest from December

15th, 1901, and the costs in said case numbered 118632. That in addition to the schedules of indebtedness above set out there is due the Clerk of this court for costs, including a fee, $221, to William F. Copeland for stenographic fees, the sum of $686.29, and the costs in the case of Stubbs *vs.* McFarlan ($57.79), in Armstrong *vs.* McFarlan ($56.79), in Stewart *v.* McFarlan ($63.12), Martin *vs.* McFarlan ($103.72), and Bohmert *vs.* McFarlan *et al.*, ($84.79), making in all $1,051.90, which is payable by the following named persons in the amounts set out opposite their names:

Theresa J. Wehrmann	$228.66
Merchants National Bank	411.60
Armstrong estate	137.20
Moses Krohn	45.74
Leopold Feiss	45.74
Benjamin Pritz	45.74
Peter G. Thompson	45.74
Margaret McArdle, administratrix	45.74
Joseph Taylor	45.74
	$1051.90

That there was further due as an allowance to Clement Bates as master and stenographic expenses, the sum of nine hundred and sixty and ninety hundredths ($960.90) dollars, upon which
70 there still remains due the sum of $610.90, Leopold Feiss, Moses Krohn, Benjamin Pritz and Joseph Taylor having paid said master $50, and the Armstrong estate having paid $150.

The balance of the said fee is due from the following named persons in the amounts set opposite their names:

Theresa J. Wehrmann, executrix	$190.91
Merchants National bank	343.63
Peter G. Thompson	38.18
Margaret McArdle, adm'r'x	38.18
Total	$610.90

But said amount due Clement Bates as master shall be held subject to the garnishment proceedings in the case of U. S. Grant Building & Loan Company *vs.* Clement Bates *et al.*, being case No. 118,982 on the docket of the common pleas court, Hamilton county, Ohio.

6th. The court further finds that under the different classes of creditors above named and giving credit to the estate of William F. Wehrmann, to Peter G. Thompson and to Joseph Taylor for the amounts owing to them, there is still due from each of the solvent partners, including the sums due by way of contribution, as aforesaid, in all, the sums hereinafter set opposite their names, respectively, and it is ordered, adjudged and decreed that they do pay the same with interest from December 15th, 1901, within thirty days from this date:

Theresa J. Wehrmann, executrix	$1410.83
Merchants National bank	17002.82
Armstrong estate	2663.05
Moses Krohn	887.69
Leopold Feiss	887.69
Benjamin Fritz	887.69
McArdle estate	1345.58
Joseph Taylor	533.99
John Brokamp	200.00
Total	$25839.24

and that in default of such payment execution is awarded therefor. All costs not yet taxed shall be paid one-twenty-third by each solvent share, and overplus in payments made as above to be applied toward said costs. But Leopold Feiss having pending this suit departed this life, and Sarah Feiss, his executrix, having been substituted for him as a party defendant hereto, and the cause revived in her name, the finding of the amount due from Leopold Feiss shall stand as a finding and decree against said Sarah Feiss, his executrix, and upon payment to the clerk of this court of each and
71 all of the amounts so found due from the respective partners, with interest from December 15th, 1901, each partner so paying and said Sarah Feiss, executrix, may have the finding and decree so found against him or her satisfied upon the record.

In the event of a deficiency by reason of the subsequent insolvency of any of said partners, such deficiency shall be paid by the remaining solvent partners in proportion to their stock, and execution is awarded therefor. But the amount due the Emperor Building & Loan Company shall not be paid until the land upon which said amount is secured by mortgage shall have been sold in foreclosure proceedings now pending, and the deficiency, if any ascertained, and then only said deficiency shall be paid in the proportions designated in the fourth paragraph hereof, and upon the payment of said sums so decreed to be paid to the clerk, said clerk shall make the distribution and payment as provided herein.

7th. The court further finds that at the time the indebtedness to the William F. Wehrmann estate was incurred, four lots were conveyed to him as security, being lots numbered 65, 68, 69 and 72 on the plat book of Elsmere, as recorded in plat book 8, Vol. 2, pages 35 and 36 of the Hamilton County Records, which lots he still holds, and which ought to be sold for the benefit of the creditors or the partners paying off the indebtedness. And it is ordered and adjudged that said four lots be sold and the proceeds thereof shall be divided between the partners paying in the case, in proportion to the shares held by them as above found in the Elsmere Syndicate. Attorneys' fees are disallowed.

8th. The following persons are dismissed from the case with their costs;

Rudolph Gohs, Henry W. Meier, Harry D. Brown, Gertrude Marcus, John W. Fisher, John M. Bolan, A. W. Williamson, Ger-

trude Spencer, Gertrude A. Spencer, George M. A. Spencer, Richard Himpel, the Second National Bank, Rebecca K. Brown, Anna L. McFarlan, Benjamin F. Ehrman, Wm. A. R. Tenney, Frederick Kinsinger, administrator, and the cross-petition of Joseph S. Cleneay and Harry Q. Cleneay, Mary J. C. Johnstone, executors and trustees of the estate of George W. B. Cleneay, deceased, are dismissed
72 at their costs; to all of which Theresa J. Wehrman, executrix, excepts.

The Merchants National Bank, Moses Krohn, Sarah Feiss, executrix; Benjamin Pritz, Joseph Taylor and James C. Armstrong, Floris A. Sackett and Isaac B. Matson, as executors of the estate of James M. Armstrong, deceased; Joseph S. Cleneay, individually and Harry Q. Cleneay and Mary J. C. Johnstone, as executors and trustees of the estate of George W. B. Cleneay, deceased; Peter G. Thompson, each severally except; and Theresa J. Wehrmann, executrix, Peter G. Thompson having filed amended motions for a new trial, and Harry Q. Cleneay and Mary J. C. Johnstone, executors and trustees, and Joseph S. Cleneay having filed a motion for a new trial, said motions are each overruled, and said Theresa J. Wehrmann, executrix, Peter G. Thompson each severally except thereto, and said Harry Q. Cleneay and Mary J. C. Johnstone, executors and trustees, and Joseph S. Cleneay also except to the overruling of their motion, and M. Louise Armstrong, Adeline A. Stubbs, Wm. H. Martin, Christine Emmeluth, Caroline Bohnert each except to so much of the above as dismissed Rudolph Gohs, Harry D. Brown, John W. Fisher, John M. Bolan, A. W. Williamson, Gertrude Spencer, Gertrude A. Spencer, Rebecca K. Brown, Anna L. McFarlan from this case, and also because of the refusal to give them judgments against each of the above defendants, and the defendants, the Merchants National Bank and John Brokamp, for the amount of their claims remaining unpaid. The motion for a rehearing by Merchants National Bank is overruled, to which it excepts.

May 7, 1902, motion to stay execution thirty days, etc., filed.
May 7, 1902, Motion for a new trial filed.
May 7, 1902, Motion for a new trial filed.
May 7, 1902, Motion for a new trial filed.
May 7, 1902, Motion for a new trial filed.
May 7, 1902, Motion for a new trial filed.
June 2, 1902. Minute 209: Entry overruling motion for a new trial; Merchants National Bank excepts.

73 *Motion for New Trial.*

(Filed May 6, 1902.)

Now comes the Merchants National Bank, one of the parties hereto, by Herron, Gatch & Herron, its attorneys, and moves the Court that the decision rendered herein be vacated and a new trial granted, for the following reasons:

1. Because the decision of the court is not sustained by sufficient evidence.

2. Because the decision of the court is contrary to law.

3. Because of errors of law occurring at the trial, and excepted to by the said the Merchants National Bank.

4. Because the said The Merchants National Bank is a corporation organized under the banking laws of the United States, and the decision rendered herein is to the effect that such a corporation has power to be or become the member of a partnership.

THE MERCHANTS NATIONAL BANK,
By HERRON, GATCH & HERRON,
Its Attorneys.

Petition in Error.

(Filed September 2, 1902.)

Supreme Court of Ohio.

No. 8133.

THE MERCHANTS NATIONAL BANK, a Corporation Organized under the Banking Laws of the United States and Doing Business in the City of Cincinnati, Plaintiff in Error,

vs.

THERESA J. WEHRMANN, Executrix of the Estate of William F. Wehrmann, Deceased; James C. Armstrong, Floris A. Sackett, and Isaac B. Matson, Executors under the Last Will and Testament of James M. Armstrong, Deceased; Margaret McArdle, Administratrix of the Estate of James McArdle, Deceased; Moses Krohn, Sarah Feiss, Executrix of the Estate of Leopold Feiss, Deceased; Benjamin Pritz, W. W. Brown, Trustee, John Brokamp, Myron A. Spencer, Adam T. Voll, Peter G. Thompson, Joseph Taylor, Ella C. O'Donnell, Executrix of the Estate of Peter J. Dunn, Deceased; Michael Marcus, Frank B. McFarlan, J. Fred Woltz, Adeline A. Stubbs, M. Louise Armstrong, William H. Martin, Louise V. Stewart, Caroline Bohnert, E. Reeder Donohue and C. H. Avery, Receivers of the Emperor Building & Loan Company, a Corporation Organized under the Laws of the
74 State of Ohio; George Gunckel, Julia Murphy, The Fifth National Bank, a Corporation Organized under the Laws of the United States; Alfred G. Allen, C. B. Matthews, C. B. Matthews and Harlan Cleveland, Partners Doing Business under the Firm Name of Matthews & Cleveland; C. B. Matthews, Harlan Cleveland, and Robert Bowler, Partners Doing Business under the Firm Name of Matthews, Cleveland & Bowler; Jacob Schroder, James E. Robinson, Alice G. Hunt, John M. Jameson, Edward A. Sherman, David Spritz, Fannie Tuchfarber, Caroline Voll, Stella C. Voll, Clara V. Jameson, Christine Emmeluth, Alice Jones, Clement Bates, The U. S. Grant Building & Loan Company, Harry Q. Cleneay, and Mary J. C. Johnstone, Executors and Trustees of the Estate of George W. B. Cleneay, Deceased, and Joseph Cleneay, Rudolph Gohs, Henry W. Meier, Harry D. Brown, Gertrude Mar-

cus, John W. Fisher, John M. Bolan, A. W. Williamson, Gertrude Spencer, Gertrude A. Spencer, George M. A. Spencer, Richard Hempel, The Second National Bank, Rebecca K. Brown, Anna L. McGarlan, Benjamin F. Erhman, William A. R. Tenney, Frederick Kinsinger, Administrator, Defendants in Error.

Now comes the plaintiff in error, the Merchants National Bank, a corporation organized under the banking laws of the United States, and doing business in the City of Cincinnati, and complains of the defendants in error and alleges that in a certain proceeding pending in the Circuit Court of the County of Hamilton, and State of Ohio, and numbered on the docket of that court 3387, wherein the defendant in error, Theresa J. Wehrmann, as executrix of the estate of William F. Wehrmann, deceased, was plaintiff and this plaintiff in error and others were defendants, a transcript of the docket and journal entries of which proceeding is filed herewith and marked Exhibit "A," and also the original papers in said proceeding, marked Exhibit "B," which case had come into said court on appeal from the Court of Common Pleas of Hamilton County, Ohio, certain proceedings were had, whereby a finding, decree and judgment was rendered against the plaintiff in error, on the 5th day of May, 1902, for the sum of $17,002.82, as more particularly appears from the said transcripts and original papers filed herewith.

The plaintiff in error further alleges that there is manifest error in said record and proceedings in the following respects, to-wit:

1st. The court erred in finding that the plaintiff in error was the owner of nine shares in the so-called Elsmere Syndicate.

2d. The court erred in finding that said shares had been transferred to the plaintiff in error as the owner thereof, and not merely as the pledgee thereof.

75 3d. The court erred in finding that the plaintiff in error was a partner in the partnership known as the Elsmere Syndicate.

4th. The court erred in its construction of the banking laws of the United States, and in its holding that the plaintiff in error, a corporation organized under the banking laws of the United States, had power, under such laws, to be and become a member of a partnership dealing in real estate.

5th. The court erred in its construction of the said banking laws of the United States in holding that under such laws the board of directors of the plaintiff in error had power, without the assent of the stockholders of the plaintiff in error, to cause the plaintiff in error to be or become a member of a partnership dealing in real estate.

6th. The court erred in finding that the board of directors of the plaintiff in error knew of or assented to the plaintiff in error becoming a member of a partnership dealing in real estate.

7th. The court erred in overruling the exceptions of the plaintiff in error to the master's report filed in said court.

8th. The court erred in overruling the motion of the plaintiff in error for a new trial.

9th. The court erred in decreeing and finding that the plaintiff in error should pay the said sum of $17,002.82.

10th. The court erred in not dismissing the plaintiff in error from the said case.

And there are other errors apparent upon the face of the record.

Wherefore, the plaintiff in error asks this Court to reverse said finding, judgment and decree of said Circuit Court against it, and that it may be restored to all it has lost by reason thereof.

HERRON, GATCH & HERRON,
Attorneys for the Plaintiff in Error.

(Duly verified.)

76 *Judgment of Supreme Court, January, 1903, Term.*

(Entered October 27, 1903.)

This cause came on to be heard upon the transcript of the record of the circuit court of Hamilton county, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same hereby is, reversed; and this cause is remanded *to*, to the circuit court of Hamilton county, with instruction to proceed and ascertain the amount of debts and expenses of said Elsmere syndicate remaining unpaid after the application of the assets of said syndicate to the payment of its debts, including interest, and then render judgment against said plaintiff in error for nine-fortieth parts of said debts and interest remaining so unpaid, and also render judgment against said plaintiff in error for nine-fortieth parts of the costs.

It is further ordered and adjudged by this court that the cross-petition in error heretofore filed herein by Joseph S. Cleneay, Harry Q. Cleneay and Mary J. C. Johnstone, executors and trustees of the estate of George W. B. Cleneay, deceased, be, and the same is hereby, affirmed.

And it is further ordered and adjudged that said plaintiff in error recover from the said defendants in error, its costs in and about this suit expended in this court, taxed at $——.

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EXHIBIT 56.

Deed.

Trustees of Elsmere Syndicate to George Gunckle.

Know all men by these presents: That M. A. Spencer, F. B. McFarlan and James McArdle, Jr., as trustees of the Elsmere Syndicate, grantors, in consideration of one thousand dollars to them paid by George Gunckle, grantee, do hereby grant, bargain, sell and convey to the said grantee, his heirs and assigns forever, the following described real property situate in section thirty-three (33), Columbia Township, Hamilton County, State of Ohio, to-wit: Lot No. Three hundred and five (305) of Elsmere, as shown on a plat made by

said trustees and J. S. and G. W. B. Cleneay, and recorded in Plat Book No. 8, Vol. 2, at pages 35 and 36 of the Land Records of Hamilton County, being a subdivision of the tract of land situated in said Hamilton County and conveyed by John Woltz and wife to said grantors by deed recorded in Book 668 at page 1 of said Land Records, but subject to the express condition that before the year 1900 no building shall be erected thereon costing less than $2000, nor so that any part thereof may be nearer than thirty feet to the front line of said lot, and all the estate, right, title and interest of the said grantors in and to said premises. To have and hold the same with all the privileges and appurtenances thereunto belonging to said grantor, his heirs and assigns, forever.

And the said grantors for themselves and successors and assigns do hereby covenant and warrant that the title so conveyed is clear, free and unincumbered, and that they will defend the same against all lawful claims of all persons whomsoever.

In witness whereof, the said grantors have hereunto set their hands this eighteenth day of August, in the year A. D., eighteen hundred and ninety.

78

M. A. SPENCER,
JAMES McARDLE, Jr.,
F. B. McFARLAN,
Trustees of the Elsmere Syndicate.

Signed and acknowledged in presence of us:
GEO. M. A. SPENCER,
To Spencer.
JOHN COLLINS,
To McArdle, Jr.
C. V. JAQUITH,
To McFarlan.
J. E. BROWN,
To all.

(Duly acknowledged.)
Received for record August 28, 1890, at 3:20 o'clock, p. m.

Exhibit 58.

Elsmere, *Hamilton County, Ohio.*

Title Bond and Agreement.

Know all men by these presents: That M. A. Spencer, F. B. McFarlan, and Jas. McArdle, Jr., Trustees of the Elsmere Syndicate (Hereinafter called the Trustees), are firmly held and bound unto Caroline Bohnert of Cincinnati, Ohio, (hereinafter called the purchaser), in the sum of Twelve Hundred and Fifty Dollars, to the payment of which they bind themselves, their successors and assigns.

The condition of this obligation is such that whereas, said Trustees have agreed to convey to the purchaser, the following described

lot of land, to-wit: Lot No. 165 of Elsmere, as recorded in Plat Book No. 8, Vol. 2, at pages 35 and 36 of the land records of Hamilton County, State of Ohio, situate in section 33, Columbia Township, Hamilton County, Ohio, the said lot to be conveyed in fee simple by a good and sufficient deed of warranty, and the title thereto to be free from all encumbrances, but upon the express condition that, before the year 1900, no building shall be erected thereon costing less than $2,500, nor so that any part thereof may be nearer than thirty feet to the front of said lot.

And said trustees have agreed to grade, macadamize and lay sidewalks and plant shade trees on the street on which said lot abut-, and to pay the taxes to become due on said lot before the delivery of the deed there-for, as herein provided, and to deliver such deed to the purchaser after payment of one-third of the purchase money, the balance to be secured by mortgage on the premises and paid in installments as hereinafter specified. And said trustees have agreed to allow the purchaser a credit of ten per cent. if one-half of
79 the purchase money is paid to them within sixty days from the date hereof, and a credit of twenty- per cent. if all the purchase money is paid within said time.

And whereas, in consideration of the foregoing agreement, the purchaser has agreed with said Trustees to pay to them, at the office of Elsmere Syndicate, No. 271 Main street, Cincinnati, Ohio, the sum of Twelve Hundred and Fifty Dollars, at the time and in the manner following to-wit, Twenty-five Dollars on execution hereof and two dollars on Monday in each and every week thereafter until said sum is fully paid, time being the essence of this agreement.

And the purchaser has agreed that he will not assign his interest herein, without the consent, in writing, of said Trustees, and if said interest, without such consent, is assigned, sold, attached or levied on, or if default is made in the payment of any installment, and continues for fourteen days thereafter, then said Trustees may elect to declare all obligations and agreements hereunder as ended and void, and in such event, all money paid in accordance herewith shall belong to said Trustees as rent for said property to the date of such default.

Now, therefore, if said Trustees, after the faithful and prompt performance by the purchaser of his said agreement, shall fail to keep and perform their agreement as herein set forth, then this obligation shall be — remain in full force and effect; and otherwise it shall be void.

In Witness Whereof, the said parties have hereunto, and to a duplicate hereof, subscribed their names this 28th day of May, in the year 1889.

M. A. SPENCER,
JAMES McARDLE, JR.,
F. B. McFARLAN,
Trustees of the Elsmere Syndicate.
CARRIE BOHNERT.

Signed in presence of
JACOB WOLF.
A. T. VOLL.

80 EXHIBIT 63.

Deed.

Trustees of Elsmere Syndicate. Alice Jones.

Know all men by these presents, That M. A. Spencer, F. B. McFarlan and James McArdle, Jr., as trustees of the Elsmere Syndicate, grantors, in consideration of twelve hundred and fifty dollars to them paid by Alice Jones of London, Ky., grantee, do hereby grant, bargain, sell and convey to the said grantee, her heirs and assigns forever, the following described real property situate in Section thirty-three (33), Columbia Township, Hamilton County, State of Ohio, to-wit: Lot No. three hundred and ninety-nine (399) of Elsmere, as shown on a plat made by said trustees and J. S. and G. W. B. Cleneay and recorded in plat book No. 8, Vol. 2, at pages 35 and 36 of the land records of Hamilton County and conveyed by John Woltz and wife to said grantors by deed recorded in book 668 at page 1 of the said land records, but subject to the express condition that before the year 1900 no building shall be erected thereon costing less than $2,500, nor so that any part thereof may be nearer than twenty-five feet to the front line of said lot.

And all the estate, right, title and interest of the said grantors in and to said premises. To have and hold the same with all the privileges and appurtenances thereunto belonging to the said grantee, her heirs and assigns forever, and the said grantors for themselves and the successors and assigns do hereby covenant and warrant that the title so conveyed is clear, free and unincumbered and that they will defend the same against all lawful claims of all persons whomsoever.

In Witness Whereof, the said grantors have hereunto set their hands this third day of July in the year A. D., eighteen hundred and ninety.

M. A. SPENCER,
JAS. McARDLE, JR.,
F. B. McFARLAN,
Trustees of the Elsmere Syndicate.

Signed and acknowledged in presence of us:
GEORGE M. A. SPENCER,
To Spencer.
JOS. McARDLE,
To McArdle.
JOHN F. FALLON,
To McFarlan.
J. E. BROWN,
To all.

(Duly acknowledged.)
Received for record July 8, 1890 at 10:30 o'clock a. m.

81 EXHIBIT 67.

Know all men by these presents: That M. A. Spencer, F. B. McFarlan and James McArdle, Jr., as trustees of the Elsmere Syndicate, grantors, in consideration of twelve hundred and fifty dollars to them paid by Christina Emmeluth, grantee, do hereby grant, bargain, sell and convey to the said grantee, her heirs and assigns forever, the following described real property situate in section thirty-three (33), Columbia Township, Hamilton County, State of Ohio, to-wit: Lot No. four hundred and two (402) of Elsmere as shown on a plat made by said trustees and J. S. and G. W. B. Cleneay and recorded in Plat Book No. 8, Vol. 2, at pages 35 and 36, of the Land records of Hamilton County, being a subdivision of the tract of land situate in said Hamilton County, and conveyed by John Woltz and wife to said grantors, by deed recorded in book 668, at page 1, of said land records, but subject to the express condition that before the year 1900 no building shall be erected thereon costing less than $2,000, nor so that any part thereof may be nearer than 30 feet to the front line of said lot, and all the estate, right, title and interest of the said grantors in and to said premises; to have and to hold the same, with all the privileges and appurtenances theunto belonging, to said grantee, her heirs and assigns forever. And the said grantors, for themselves and the successors and assigns, do hereby covenant and warrant that the title so conveyed is clear, free and unincumbered, and that they will defend the same against all lawful claims of all persons whomsoever.

In Witness Whereof, the said grantors have hereunto set their hands, this fifteenth day of July, in the year A. D., eighteen hundred and ninety.

M. A. SPENCER,
JAS. McARDLE, JR.,
F. B. McFARLAN,
Trustees of the Elsmere Syndicate.

Signed and acknowledged in the presence of us:
C. V. JAQUITH.
J. E. BROWN.

(Duly acknowledged.)

82 Presented for record on the 26th day of July, 1890 at 3.35 o'clock p. m. Recorded July 30th, 1890, in Deed Book No. 697, page 76.

EXHIBIT 68.

$382.50. CINCINNATI, *Nov.* 18, 1895.

Six months after date we promise to pay to the order of M. A. Spencer three hundred and eighty-two dollars and fifty cents, with interest.

Value received.

(Signed) M. A. SPENCER,
(Signed) F. B. McFARLAN,
Trustees of the Elsmere Syndicate.

Endorsed: M. A. Spencer, Demand notice and protest waived. M. A. Spencer.

EXHIBIT 74.

$1600. CINCINNATI, *Oct.* 24, 1890.

On demand after date we promise to pay to the order of Peter G. Thomson, sixteen hundred dollars, at our office, with six per cent. interest.

Value received.

No. — Due ——

M. A. SPENCER,
JAS. McARDLE, JR.,
F. B. McFARLAN,
Trustees of Elsmere Syndicate.

EXHIBITS — BUILDING ASSOCIATION.

No. 973. CINCINNATI, *Feb'y 24th*, 1891.

Mr. Fred. Scharringhausen, treasurer of the Emperor Building & Loan Company, pay to the order of M. A. Spencer, F. B. McFarlan and James McArdle, Jr., trustees, the sum of four thousand dollars, for loan on mortgage (Pass Book 292).

MICHAEL HOPE, *President.*

CHARLES BEUZER, *Secretary.*

I hereby certify to have received the above amount.

M. A. SPENCER,
JAMES McARDLE, JR.,
F. B. McFARLAN,
Trustees of Elsmere Syndicate.

83

$4,000.00,

Cincinnati, Feb'y 28, 1891.

Recorded. M. CUNNINGHAM, *Fin. Com.*

No. 974. CINCINNATI, *Feb'y 24th*, 1891.

Mr. Fred. Scharringhausen, treasurer of the Emperor Building & Loan Company, pay to the order of M. A. Spencer, F. B. McFarlan, James McArdle, Jr., trustees, the sum of three thousand dollars, for loan on mortgage (Pass Book 292).

MICHAEL HOPE, *President.*

CHARLES BEUZER, *Secretary.*

I hereby certify to have received the above amount.

M. A. SPENCER,
JAMES McARDLE, JR.,
F. B. McFARLAN,
Trustees of Elsmere Syndicate.

$3,000.00.

Cincinnati, Feb'y 28th, 1891.

Recorded. M. CUNNINGHAM, *Fin Com.*

No. 975. CINCINNATI, *Feb'y 25th*, 1891.

Mr. Fred. Scharringhausen, treasurer of the Emperor Building & Loan Company, pay to the order of M. A. Spencer, F. B. McFarlan, James McArdle, Jr., trustees, the sum of three thousand dollars, for loan on mortgage (Pass Book 292).

MICHAEL HOPE, *President.*
CHARLES BEUZER, *Secretary.*

I hereby certify to have received the above amount.

M. A. SPENCER,
JAMES McARDLE, JR.,
F. B. McFARLAN,
Trustees of Elsmere Syndicate.

$3,000.00.

Cincinnati, Feb'y 24th, 1891.

Recorded. M. CUNNINGHAM, *Fin. Com.*

84 Page 22, Cash Book—1891, Feb'y 23 to 28.

Receipts.

Cash on hand		$192.60
" installment account		109.00
" bills receivable		25.00
" interest		1.47
" Emperor B. & L. Co		10,000.00

Payments.

Cash, lease account, 10 lots		$4,500.00
" land account, rent		1,578.46
" bills payable:		
Bal. $1,632.28	$1,330.28	
	300.00	
	100.00	
	500.00	
	100.00	
	200.00	
	100.00	
	100.00	
	100.00	
	100.00	
	800.00	
		3,730.28
Cash, interest account		96.32
" sundries		112.08
Balance		310.93
	$10,328.07	$10,328.07
Balance	$310.92	

1901, October 4th.

The above statement was made by me from page 22 of the Cash Book of the Elsmere Syndicate, and I certify is a correct copy of that page of said Cash Book.

JOHN G. BROTHERTON.

Sample of Copy Sent to Stockholders.

CINCINNATI, O., *Nov. 1st*, 1894.

To the stockholders of the Elsmere Syndicate:

GENTLEMEN: Below find my report as treasurer for the month of October, 1894:

Receipts.

Oct. 1st.	Cash on hand	$195.56
	Installment account	855.00
	Bills receivable	679.00
	Bills payable	6,400.00
		$8,129.56

85

Payments.

Oct. 1st.	Emperor B. A	$50.00
	Germania, B. A	100.00
	Interest account	261.78
	Bills payable	4,000.00
	Land account	1,000.00
	Commission	41.86
	Expense	16.30
	Cash on hand	201.63
		$8,129.56

Assets.

Installment account	$22,116.36
Bills receivable	4,692.47
Bldg. pipe, etc	3,960.00
Furniture	328.00
395 lots (50 ft. fr.)	284,400.00
27 lots, (100 ft. fr.)	38,880.00
Cash on hand	201.63
	$354,578.40

Liabilities.

Capital stock	$120,000.00
Lease account	119,400.00
Bills payable	16,981.00
Mtg., Germania	5,738.38
Mtg., Emperor	8,045.10

Flo'l Ave. bond No. 1.....	7,823.41
Flo'l Ave. bond No. 2.....	15,761.00
	$293,748.89
Net assets.....	60,829.51
	$354,578.40

Respectfully,

JOHN G. BROTHERTON, *Sec'ry.*

86 *Mortgage of M. A. Spencer et al., Trustees to the Emperor Building & Loan Company.*

Know all men by these presents that M. A. Spencer, F. B. McFarlan and James McArdle, Jr., trustees of the Elsmere syndicate of Hamilton county, Ohio, in consideration of ten thousand dollars, the estimated value of twenty shares of its capital stock, to them paid by the Emperor Building & Loan Company, of Cincinnati, a corporation under the laws of Ohio, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey to said building and loan company, its successors and assigns forever, the following described real estate, to-wit:

Situate in section thirty-three, Columbia township, said Hamilton county and State of Ohio, and being more particularly described as lots number two hundred and fifty-two (252), two hundred and fifty-five (255), two hundred and fifty-six (256), two hundred and fifty-nine (259), two hundred and sixty (260), two hundred and sixty-three (263), two hundred and sixty-four (264), two hundred and sixty-seven (267), two hundred and seventy-two (272), and two hundred and seventy-five (275) of Elsmere, as shown on the plat made by the said trustees and J. S. and G. W. B. Cleneay, and recorded in Book No. 8, volume 2, at pages 35 and 36 of the land records of Hamilton county, Ohio, and being the same premises conveyed to the said trustees by the said J. S. and G. W. B. Cleneay by deed duly recorded herewith, and all the real estate and interest of the said grantors either in law or equity, of, to and in the said premises, together with all the privileges and appurtenances to the same belonging, and all the rents, issues and profits thereof, to have and to hold the same, to the only proper use of the said building and loan company, its successors and assigns, forever.

And the said grantors, for themselves and for their successors, heirs, executors and administrators, do hereby covenant with the said building and loan company, its successo-s and assigns, that they are the true and lawful owners of the said premises, and have
87 full power to convey the same, and that the title so conveyed is clear, free and unincumbered; and further, that they will warrant and defend the same against the claims of all persons whomsoever.

Provided, nevertheless, that if the said M. A. Spencer, F. B. McFarlan and James McArdle, Jr., trustees, who have become members of the said building and loan company, and subscribed to twenty

shares therein, to be paid in weekly installments of fifty cents per share, and received in advance from said company said $10,000, the estimated value of said shares, shall pay said company, according to its constitution and by-laws, without demand therefor, any fines and assessments thereby imposed, and said weekly installments of fifty cents per share; also weekly installments of eight cents per share, as premium on said advance, and an interest upon said $10,000 in weekly payments of fifty-eight cents per share for the first year, fifty-two cents per share for the second year, forty-six cents per share for the third year, forty cents per share for the fourth year, thirty-four cents per share for the fifth year, and thereafter a weekly sum or amount sufficient to keep the interest upon the amount due at the beginning of each year at the rate of six per cent. per annum until the full amount of said twenty shares shall have been paid, with all dues, premium, interest, fines, etc., thereon, according to the constitution and by-laws, and shall pay all taxes, assessments, insurance, ground rents, or charges of any kind that may become due and payable on said property; and in case of default in making any of said payments for a period of ninety days, and a suit of foreclosure be brought therefor, then the amount of the face of this mortgage, *will* all the arrearages thereon, less the credits paid upon the principal, shall become due and payable at once, all as prescribed by the said constitution and by-laws; and if the said M. A. Spencer, F. B. McFarlin and James McArdle, Jr., trustees, shall comply with all the foregoing obligations then these presents shall be void.

In witness whereof, the said M. A. Spencer, F. B. McFarlan and James McArdle, Jr., trustees, of the said Elsmere Syndicate, have hereunto set their hands this 27th day of February, in the
88 year of our Lord one thousand eight hundred and ninety-one.

M. A. SPENCER. [SEAL.]
JAMES McARDLE, JR. [SEAL.]
F. B. McFARLAN. [SEAL.]

Signed, sealed and acknowledged in presence of us:
T. J. McFARLAN.
J. E. BROWN.

(Duly acknowledged by M. A. Spencer, F. B. McFarlan and James McArdle, Jr., Trustees.)

Received for record February 28, 1891, at 1.20 o'clock p. m.
Recorded in Book 615, page 337.

89 *Transcript of Additional Docket and Journal Entries in Circuit Court.*

(Filed in Supreme Court June 10, 1904.)

April 8, 1904. Minute 375. Final Decree.

This case coming on for hearing on appeal upon the original papers, transcript and proofs and mandate sent down from the Supreme Court modifying the former judgment of this court; and

the court being fully advised in the premises finds that since the entry of the original final decree in this court, the Emperor Building & Loan Company has, by a sale of lands in foreclosure proceedings, realized a portion of its debt, and that the schedule of creditors contained in the fifth paragraph of the said original decree in this court must therefore be modified by the finding that there is due said Emperor Building & Loan Company the sum of six thousand seven hundred and sixty-four ($6,764.70) dollars and seventy cents, instead of ten thousand three hundred and sixteen ($10,316.15) dollars and fifteen cents as originally found, and that the aggregate if said first schedule of syndicate indebtedness is reduced from twenty-six thousand four hundred and sixty-nine ($26,469.04) dollars and four cents to twenty-two thousand three hundred and sixty-two ($22,362.59) dollars and fifty-nine cents, by the additional credits of $555.00 which is the proportionate part of the sum of $1,065.32 to be paid in by Theresa J. Wehrmann, executrix, as hereinafter specified, said sum of five hundred and fifty-five ($555.00) dollars to bear interest, however, from December 15th, 1901, amounting on April 1st, 1904, to six hundred and thirty one ($631.26) dollars and twenty-six cents.

The several debts of said syndicate constituting said aggregate to bear interest from the 15th day of December, 1901, as provided for in said original decree, and upon such indebtedness the following named persons are liable for several amounts set opposite their names, with interest from said date, to-wit, December 15th, 1901, to-wit:

Theresa J. Wehrmann, executrix		$6,146.78
	Merchants' National Bank	5,031.58
90	James Armstrong's estate	3,688.07
	Moses Krohn	1,229.26
Leopold Feiss		1,229.36
Benjamin Pritz		1,229.36
Peter G. Thomson		1,229.36
Joseph Taylor		1,229.36
Margaret McArdle		1,229.36
John Brokamp		120.00
		$22,362.59

That on the second schedule of indebted-ess, amounting to sixteen thousand, seven hundred and fifty-eight ($16,758.00) dollars, all of the solvent stockholders have made payments and have been discharged, as set out and declared in said original decree, with the exception of the Merchants National Bank, and it owes of said indebtedness nine fortieths after crediting the balance of said $1,065.32, amounting to three thousand, six hundred and eighty-four ($3,684.91) dollars and ninety-one cents, and John Brokamp eighty dollars ($80.00), and the balance due on said debts bear interest from December 15th, 1901, and the amount due from the Merchants National Bank and John Brokamp thereon shall bear in-

terest from the same date, and said sum of three thousand, six hundred and eighty-four ($3,684.91) dollars and ninety-one cents and the said $80.00 and the sum of $336.96, with interest from December 15th, 1901, out of the $1,065.32 to be paid into court by the said Theresa J. Wehrmann, executrix, as hereinafter mentioned, shall be paid to the said creditors constituting the second schedule above mentioned in the following sums:

M. L. Armstrong	$360.41
Caroline Bohnert	263.00
Alice G. Hunt	284.38
John M. Jameson	204.54
Edward A. Sherman	198.38
David Spritz	629.60
Louise V. Stewart	368.51
Adeline A. Stubbs	344.17
Fanny Tuchfarber	207.46
Caroline Voll, Mrs. Clara Voll Jameson and Mrs. Stella C. Voll	499.85
George Kunkel	324.70
Alice Jones	405.87
	$4,090.87

And Peter G. Thomson is entitled to contribution from Theresa J. Wehrmann, executrix, in the sum of five hundred and
91 seventy-eight ($578.04) dollars and four cents. The court further finds that there has been realized from the sale of certain lots, which had been decided as security to William F. Wehrmann in his life time and which have been sold by Theresa J. Wehrmann, his executrix, the sum of one thousand and sixty-five ($1,065.32) dollars and thirty two cents after paying all the charges, including taxes and expenses of sale thereon, and it is directed by the court that said sum be paid to the clerk of this court and five hundred and fifty-five ($555.00) dollars, with interest from December 15th, 1901, applied to the reduction of the first schedule of debts and $326.96, with interest from December 15th, 1901, to the reduction of the second schedule and re-adjusting the charge against certain of the partners who were liable to Clement Bates as master, of which said Merchants National Bank is liable for only nine-fortieths of the original charge, this court finds that of the balance of six hundred and ten ($610.90) dollars and ninety cents found in the original decree the following are liable:

Theresa J. Wehrmann, executrix	$265.95
Merchants National Bank	216.20
Peter G. Thomson	53.19
Margaret McArdle, administratrix	53.19
	$588.53

Certain of the partners, to-wit, Leopold Feiss, Moses Krohn, Benjamin Prutz, Joseph Taylor and the estate of James Armstrong, each

having paid the sum of fifty ($50.00) dollars per share held by them in the said syndicate to the said Clement Bates, and received a full satisfaction and discharge and said sum of five hundred and eighty-eight ($588.53) dollars and fifty three cents shall be a full discharge of the claim of said Clement Bates.

But the said sums shall be held as provided in said original decree, subject to the garnishment proceedings in the U. S. Grant Building & Loan Company *vs.* Clement Bates and others, No. 118982 on the docket of the Court of Common Pleas of this Court. That for the costs in the Supreme Court, amounting to three hundred and forty-seven ($347.90) dollars and ninety cents the following
92 are liable in the sums set opposite their names:

Joseph S. Cleneay and the executors of George W. B. Cleneay	$69.58
Theresa J. Wehrmann, executrix	99.40
The Armstrong estate executors	59.64
Moses Krohn	19.88
Sarah Feiss, executrix	19.88
Benjamin Pritz	19.88
Joseph Taylor	19.88
Peter G. Thomson	19.88
Margaret McArdle	19.88
	$347.90

And said sum shall be deducted from the amount due from and payable by the Merchants National Bank, so far as they have paid such costs and the balance of the costs, excluding the fee of Clement Bates, master, amounting to one thousand and eighty-two ($1,082.04) dollars and four cents shall be paid by the following in the amounts set opposite their names:

Theresa J. Wehrmann	$299.50
Merchants National Bank	243.44
Armstrong Estate Executors	179.79
Moses Krohn	59.90
Sarah Feiss, Executrix	59.90
Benjamin Pritz	59.90
Joseph Taylor	59.90
Peter G. Thomson	59.90
Margaret McArdle, Executrix	59.90
	$1,082.04

The court further find that under the different classes of creditors above named and giving credit to the estate of William F. Wehrmann, Peter G. Thomson and Joseph Taylor for the amounts owing to them, there is still due from each of the solvent partners as aforesaid the sums hereinafter set opposite their names respectively, and it is ordered, adjudged and decreed that they pay the sum to the Clerk of this court for distribution in accordance with the rights of

the creditors as heretofore found, with interest from December 15th, 1901, except as to the amounts due for costs, and to Clement Bates, on which interest does not run within thirty (30) days from this date, to-wit:

Theresa J. Wehrmann, executrix	$1,105.14
Merchants National Bank	9,167.13
Joseph Taylor	975.44
James Armstrong estate	3,927.41
Moses Krohn	1,309.14
Sarah Feiss, Executrix	1,309.14
Benjamin Pritz	1,309.14
Margaret McArdle, executrix	1,362.33
John Brokamp	200 00
Joseph S. Cleneay and the executors of G. W. B. Cleneay	69.58
	$20,743.45

93 The amount due Peter G. Thomson after crediting him with all of the indebtedness of the syndicate partners to him and charging him with his share of the various debts is two thousand, four hundred and sixteen ($2,416.43) dollars and forty-three cents, with interest from December 15th, 1901, five hundred and seventy-eight ($578.04) dollars and four cents of which is due from Theresa J. Wehrmann, executrix, to which he is entitled with interest from December 15th, 1901, and there is also due in accordance with the terms of the original decree to Adam T. Voll the sum of nine hundred and ten ($910.00) dollars with interest from December 15th, 1901, from Theresa J. Wehrmann, executrix, and in default of payment by said members of said syndicate so found indebted to the various creditors of the said syndicate in the amount set opposite their names in the last above mentioned schedule and to Peter G. Thomson and Adam T. Voll execution is awarded therefor.

This court further finds that out of the sum of one thousand and sixty-five ($1,065.32) dollars and thirty-two cents to be paid in to the clerk of this court by Theresa J. Wehrmann, executrix, as the proceeds of certain lots sold, there remains after crediting a proportionate share of the first schedule of debts the sum of four hundred and thirty-four ($434.06) dollars and six cents, which is to be divided as follows, after deducting the further sum of $326.96, with interest from December 15th, 1901, leaving fifty-four ($54.63) dollars and sixty-three cents, with interest from December 15th, 1901, applied to the second schedule of creditors, to-wit:

Merchants National Bank	$12.30
Theresa J. Wehrmann	15.10
Armstrong estate executors	9.06
Moses Krohn	3.03
Leopold Feiss, Sarah Feiss, executrix	3.03
Benjamin Pritz	3.03
Peter G. Thompson	3.01

Joseph Taylor	3.03
Margaret McArdle	3.03
	$54.63

and shall be credited on the indebtedness of each, respectively. But if the indebtedness of any of said last mentioned distributees is not paid in full, the amount so to be credited shall be retained
94 as a credit against the payments to be made by the respective parties who do not pay in full.

The said sum of $326.96, with interest from December 15th, 1901, mentioned above, is out of the one thousand and sixty-five ($1,065.32) dollars and thirty-two cents paid in by Theresa J. Wehrmann, executrix, and said sum of three hundred and twenty-six ($326.96) dollars and ninety-six cents, with interest, with the other sums mentioned hereinabove, shall be payment in full of said second schedule.

In all other respects said original decree shall stand as originally entered, with only the modification hereinbefore provided for. But the claims set forth in the supplemental petition of Peter G. Thomson heretofore allowed to be filed in this case, and which claims arise upon certain promissory notes in possession of Michael Ryan, who claims to own the same, as in said supplemental petition set out, are hereby reversed for further hearing and adjustment, and this court reserves the right to make such order against any or all of the parties hereto as upon hearing may be proper and right, and in case said claims are found to be valid claims against the parties or any of them hereto, to direct the payment thereof, together with costs by such parties as may be liable therefor in proper proportions, but such reservation shall not disturb the present liabilities of the parties and the payment thereof towards the liquidation of the debts hereinbefore provided for nor delay the payment of the same.

In the event of deficiency in the payment of any of the indebtedness hereinbefore found, by reason of the insolvency of any of the persons or estates hereinbefore found liable, or by reason of the inability to collect on execution from any of the parties so found liable, such deficiency shall be paid by the remaining solvent parties so found liable, except the Merchants National Bank, in proportion to the stock so held by such parties, and the court reserves the right to make such further order herein as may be necessary by reason of any such deficiency.

The Merchants National Bank hereby excepts to each and every part of the foregoing decree.

95 Moses Krohn hereby excepts to each and every part of the foregoing decree.

Sarah Feiss, executrix, hereby excepts to each and every part of the foregoing decree.

Benjamin Pritz hereby excepts to each and every part of the foregoing decree.

James C. Armstrong, Floris A. Sackett and Isaac B. Matson, as executors of the estate of James M. Armstrong, except to each and every part of the foregoing decree.

Peter G. Thomson and Theresa J. Wehrmann, executrix, each severally except to each and every finding of liability against each of them and to the judgment thereon and to the distribution of the sum of $1,065.32 above mentioned.

Joseph Taylor hereby excepts to each and every part of the foregoing decree.

April 9, 1904.—Motion of Peter G. Thomson for new trial filed.

April 9, 1904.—Motion of Theresa J. Wehrmann, executrix, for new trial filed.

April 9, 1904.—Motion of Merchants National Bank for new trial filed.

April 9, 1904.—Motion of Benjamin Pritz for new trial filed.

Motion for a New Trial.

(Filed April 9, 1904.)

Now comes the Merchants National Bank, a corporation organized under the banking laws of the United States, and moves the court for a new trial in the above cause for the following reasons:

First: The decision of the court is not sustained by sufficient evidence.

Second. The decision of the court is contrary to law.

Third. There were errors of law at the trial of the case, which were excepted to by the said the Merchants National Bank at the time.

Fourth. The defendant, The Merchants National Bank, is a corporation organized under the banking laws of the United States, and as such corporation, could not, under the provisions of said laws, be held liable for any proportion of the debts and liabilities
96 of the partnership known as the Elsmere Syndicate.

THE MERCHANTS NATIONAL BANK,
By HERRON, GATCH & HERRON,
By W. C. HERRON, *Its Attorneys.*

Entry Overruling the Motion for a New Trial of the Merchants National Bank.

(Entered May 17, 1904. Minute 398.)

This cause coming on to be heard on the motion of the defendant, the Merchants National Bank, for a new trial, and on the exceptions of the said the Merchants National Bank fo- the final decree, it is hereby ordered that the said motion and the said exceptions, and each of them, be and they are hereby overruled.

To all of which the said defendant excepts.

Petition in Error.

(Filed June 10, 1904.)

Supreme Court of Ohio.

No. 9039.

THE MERCHANTS NATIONAL BANK, a Corporation Organized under the Banking Laws of the United States and Doing Business in the City of Cincinnati, Plaintiff in Error,

vs.

THERESA J. WEHRMANN ET AL., Defendants in Error.

Now comes the plaintiff in error, the Merchants National Bank, a corporation organized under the banking laws of the United States, and doing business in the city of Cincinnati, and complains of the defendants in error, and alleges that in a certain proceeding pending in the circuit court of the county of Hamilton and State of Ohio, and numbered on the docket of that court 3387, wherein the defendant in error, Theresa J. Wehrmann as executrix of the estate of William F. Wehrmann, deceased, was plaintiff and this plaintiff in error and others were defendants, a transcript of
97 the docket and journal entries of which proceeding is filed herewith and marked "Exhibit A," and also the original papers in said proceeding, including the bill of exceptions taken by the plaintiff in error therein, marked Exhibit "B," which case had come into said court on appeal from the court of common pleas of Hamilton County, Ohio, certain proceedings were had, whereby a finding, decree and judgment was rendered against the plaintiff in error on the 8th day of April, 1904, for the sum of nine thousand one hundred and seventy-six — and thirteen cents ($9,176.13,) as more particularly appears from the said transcript and original papers filed herewith.

The plaintiff in error further alleges that there is manifest error in said record and proceedings in the following respects, to-wit:

First. The said circuit court erred in its construction of the banking laws of the United States and in holding and decreeing that the plaintiff in error, a corporation organized under the banking laws of the United States, had power, under such laws, to be and become liable for a certain proportion of the debts and liabilities of the Elsmere Syndicate, a partnership, organized for the purpose of dealing in real estate.

Second. The said circuit court erred in its construction of the banking laws of the United States in holding that, under such laws, the plaintiff in error, a corporation organized under the banking laws of the United States, had power to be and become liable for a certain proportion of the debts and liabilities of the Elsmere Syndicate, a partnership organized for the purpose of dealing in real estate, which said debts and liabilities accrued against said syndi-

cate prior to the 15th day of January, 1892, and prior to the time when the shares of Frank B. McFarlan in said syndicate were transferred to W. W. Brown, trustee.

Third. The circuit court erred in its construction of the banking laws of the United States in holding that, under such laws, the board of directors of the plaintiff in error had power, without the assent of the stockholders of the plaintiff in error, to make
98 the plaintiff in error liable for any part or proportion of the debts and liabilities of the Elsmere Syndicate, a partnership organized for the purpose of dealing in real estate.

Fourth. The said circuit court erred in its construction of the banking laws of the United States in holding that the plaintiff in error had power, under such laws, to be or become liable to the estate of William F. Wehrmann in any manner on account of the discount by the plaintiff in error of certain promissory notes for the benefit of the said William F. Wehrmann.

Fifth. The said circuit court erred in finding and decreeing that the plaintiff in error was liable for any part of the debts and liabilities of the Elsmere Syndicate, which said debts and liabilities accrued against said syndicate prior to the 15th day of January, 1892.

Sixth. The said circuit court erred in finding and decreeing that the plaintiff in error became or was liable to the estate of William F. Wehrmann in any manner on account of the discount of certain promissory notes by the plaintiff in error for the benefit of the said William F. Wehrmann.

Seventh. The said circuit court erred in holding that the plaintiff in error was liable for nine-fortieths of the indebtedness set forth in the second schedule in the said decree, which said indebtedness was alleged to amount to the sum of $16,758.00, and in refusing to reduce the said indebtedness by the amount paid thereon by certain of the partners, in the Elsmere Syndicate, and by refusing to give the plaintiff in error any credit for said payments, and by decreeing that the plaintiff in error was liable for nine-fortieths of the full amount of said indebtedness, irrespective of said payments.

Eighth. The said circuit court erred in finding and decreeing that the plaintiff in error was liable for any *porportion* of the costs of this litigation.

Ninth. The circuit court erred in overruling the motion of the plaintiff in error for a new trial.

Tenth. The circuit court erred in finding and decreeing that the plaintiff in error should pay the said sum of $9,176.13.

99 Eleventh. The circuit court erred in not dismissing the plaintiff in error from said case.

And there are other errors apparent upon the face of the record.

Wherefore, the plaintiff in error asks this court to reverse said finding, judgment and decreee of said circuit court against it, and that it may be restored to all it has lost by reason thereof.

HERRON, GATCH & HERRON,
By W. C. HERRON,
Attorneys for Plaintiff in Error.

(Duly verified and summons waived.)

Motion to Dismiss Petition in Error.

(Filed June 11, 1904.)

Supreme Court of Ohio.

THE MERCHANTS NATIONAL BANK OF CINCINNATI, Plaintiff in Error,
vs.
THERESA J. WEHRMANN, Executrix of Wm. F. Wehrmann *et al.*,
Defendants in Error.

Motion to Dismiss Petition in Error.

And now comes M. Louise Armstrong, one of the defendants in error and moves the court to dismiss the new petition in error herein for the reason that the judgment of the circuit court of Hamilton County, of which plaintiff in error complains so far as it affects plaintiff in error is in exact compliance with the mandate of the Supreme Court, so that practically this proceeding is in effect an attempt to prosecute error to a judgment of the Supreme Court of Ohio.

SCHWAB & MERRILL,
Attorneys for M. Louise Armstrong, a Defendant in Error.

Messrs. Herron, Gatch & Herron, Att'ys for the Merchants National Bank.

GENTLEMEN: You are hereby notified that we will this day file a motion in the Supreme Court of Ohio in Case No. 8133, Mer-
100 chants' National Bank, plaintiff in error, *vs.* Theresa J. Wehrmann, Executrix &c., *et al.*, defendants in error, to dismiss the new petition in error and that we will call said motion for hearing on Thursday, June 16th, 1904.

SCHWAB & MERRILL,
Att'ys for M. Louise Armstrong.

Service of copy of above motion and notice is hereby acknowledged this 10th day of June, 1904.

HERRON, GATCH & HERRON,
By W. C. HERRON,
Att'ys for Plaintiff in Error.

Precipe for Transcript of Record.

(Filed April 15, 1905.)

In the Supreme Court of Ohio.

No. 9039.

THE MERCHANTS NATIONAL BANK OF CINCINNATI, Plaintiff in Error,
vs.
THERESA J. WEHRMANN, Executrix, *et al.*, Etc., Defendants in Error.

To the Clerk of the Supreme Court of Ohio:

Please transcribe for record on writ of error to the Supreme Court of the United States the following pages of the printed records respectively designated herein as Record A and B, the first being filed in Case 8133, and the second in case 9039, and no other pages.

Record A.

Page 22 to the middle of page 26, being petition filed in the Common Pleas Court July 2, 1897.

From Middle of page 28 to middle of page 29, being answer of Merchants National Bank filed November 13, 1897.

101 From the bottom of page 31 to the middle of page 39, ending "Respectfully submitted. Clement Bates, Master. January 15, 1900;" being a portion of the report of the Special Master filed January 18, 1900.

Pages 247 to middle of page 257 being Exhibits 1, 2, 3 and 4, down to Exhibit 5;

Page 343, Exhibit 6*a*, being form of the certificate of stock in the Elsmere Syndicate.

From bottom of page 261 to middle of page 263 which is headed as follows: "By-Laws of the Elsmere Syndicate," and ends with the words "at all meetings each shareholder shall be entitled to one vote for each share of stock held by him and a majority in interest so voting shall govern;" *i. e.* down to the words on page 263, "(Page 10)".

From the bottom of page 9 to the bottom of page 19, being the minute 183 judgment entry, dated May 5, 1902, of the circuit court of Hamilton County.

From the top of page 21 to the middle of page 21, being the motion for a new trial of The Merchants National Bank filed May 6, 1902.

From the middle of Page 1 to the bottom of page 3, being the petition in error in the Supreme Court of Ohio of The Merchants National Bank filed September 2, 1902.

Record B.

From the middle of page 11 to the top of page 12, being the judgment, of the Supreme Court of Ohio entered October 27, 1903.

Page 81, Exhibit 56, being form of a deed given by the Trustees of the Elsmere Syndicate.

From the top of page 82 to the middle of page 83, Exhibit 58, being form of a Title Bond and Greement by the Trustees of The Elsmere Syndicate.

From the middle of Page 83 to the middle of page 84, Exhibit 63, being form of a deed given by the Trustees of The Elsmere Syndicate.

From the middle of Page 86 to the middle of Page 88,
102 Exhibits 67, 68 and 74.

From the bottom of Page 89 to the top of Page 95 being marked "Exhibit Building Association" and the other exhibits to the end of said record.

From the middle of Page 13 to the bottom of Page 19 being the minute 375 of the Circuit Court of Hamilton County, entered April 8, 1904, and being the final decree in said court.

From the middle of Page 20 to the middle of Page 21, being the motion for a new trial of The Merchants National Bank, filed April 9, 1904, and the entry overruling the same filed May 17, 1904.

From Page 1 to the bottom of Page 3, being the petition in error, to The Merchants National Bank in the Supreme Court of Ohio, filed June 10, 1904;

The judgment Entry and Mandate of the Supreme Court last entered in this cause, and all the papers and proceedings filed in this case since that time, *i. e.* all the entries and papers filed in the case since the last hearing on the second petition in error, including this precipe.

HERRON, GATCH, HERRON & JAMES,
Att'ys for the Merchants National Bank of Cincinnati.

April 14, 1904.

103 In the Supreme Court of Ohio, January Term, A. D. 1905.

THE STATE OF OHIO, }
City of Columbus, } *ss:*

Certified Transcript of Docket and Journal Entries.

In the record and proceedings then and there had and held, among other things, is the following, to-wit:

THE MERCHANTS NATIONAL BANK, a Corporation Organized under the Banking Laws of the United States, and Doing Business in the City of Cincinnati, Plaintiff in Error,

vs.

THERESA J. WEHRMANN, Executrix of the Estate of William F. Wehrmann, Deceased; James C. Armstrong, Floris A. Sackett, and Isaac B. Matson, Executors under the Last Will and Testament of James M. Armstrong, Deceased; Margaret McArdle, Administratrix of the Estate of James McArdle, Deceased; Moses Krohn, Sarah Feiss, Executrix of the Estate of Leopold Feiss, Deceased; Benjamin Pritz, W. W. Brown, Trustee; John Brokamp, Myron A. Spencer, Adam T. Voll, Peter G. Thompson, Joseph Taylor, Ella C. O'Donnell, Executrix of The Estate of Peter J. Dunn, Deceased; Michael Marcus, Frank B. McFarlan, J. Fred Woltz, Adeline A. Stubbs, M. Louise Armstrong, William H. Martin, Louise V. Stewart, Caroline Bolmert, E. Reeder Donohue, and C. H. Avery, Receivers of the Emperor Building & Loan Company, a Corporation Organized under the Laws of the State of Ohio; George Gunkel, Julia Murphy, The Fifth National Bank, a Corporation Organized under the Laws of the United States; Alfred G. Allen, C. B. Matthews, C. B. Matthews and Harlan Cleveland, Formerly Partners Doing Business under the Firm Name of Matthews and Cleveland; C. B. Matthews and Harlan Cleveland, Surviving Partners of the Firm of Matthews, Cleveland and Bowler; Jacob Shroder, James E. Robinson, Alice G. Hunt, John M. Jameson, Edward A. Sherman, David Spritz, Fannie Tuchfarber, Caroline Voll, Stella C. Voll, Clara V. Jameson, Christine Emmeluth, Alice Jones, Clement Bates, The U. S. Grant Building & Loan Company, Harry Q. Cleneay and Mary J. C. Johnstone, Executors and Trustees of the Estate of George W. B. Cleneay, Deceased, and Joseph Cleneay, Rudolph Gohs, Henry W. Meier, Harry D. Brown, Gertrude Marcus, John W. Fisher, John M. Bolan, A. W. Williamson, Gertrude Spencer, Gertrude A. Spencer, George M. A. Spencer, Richard Hempel, The Second National Bank, Rebecca K. Brown, Anna L. McFarlan, Benjamin F. Erhman, William A. R. Tenney, Frederick Kinsinger, Administrator, Defendants in Error.

June 10, 1904. Petition in error, waiver, circuit court transcript, bill of exceptions and original papers filed.
" " " Papers sent to Herron, Gatch & Herron, Cincinnati, O.
" 11, " Motion by defendant, M. Louise Armstrong to dismiss petition in error and notice filed.
" 21, " Journal entry:
"Ordered by the court, that said motion be and the same is hereby overruled." J. 19, p. 530.
104
June 18, 1904. Statement of defendant on motion filed.
" 23, " Answer and *corss*-petition in error of Moses Krohn filed.

" " " Answer and cross-petition in error of Joseph Taylor filed.
" " " Answer and cross-petition in error of Benjamin Pritz filed.
" " " Answer and cross-petition in error of Sarah Feiss, ex'x, filed.
" " " Answer and cross-petition in error of James C. Armstrong, Floris A. Sackett and Isaac B. Matson executors of James M. Armstrong, deceased, filed.
" " " Papers sent Herron, Gatch & Herron. Returned.
" 28, " Precipe for summons in error filed.
" " " Summons in error issued to sheriff of Hamilton Co., O., for defendants, Wm. H. Martin, Caroline Bohnert, Julia Murphy and Christine Emmeluth (to be served upon Gideon C. Wilson, att'y of record), returnable July 11, A. D., 1904.
July 9, " Summons returned and filed, endorsed—1904, June 30, "Served the within named William H. Martin, Caroline Bohnert, Julia Murphy and Christine Emmeluth (impleaded with others), defendants in error, by leaving a true copy of this writ with all the endorsements thereon with Gideon C. Wilson, att'y of record, personally. (Fees $1.24) S. Jones, Sheriff, by R. Sweeny, Dep."
" 18, " Cross-petition in error of Peter G. Thomson, def't in error, and Circuit Court transcript filed.
" 26, " Additional Circuit Court entries (2) filed.
Aug. 2, " Printed supplemental record filed.
" 5, " Proofs (2) of service filed.
" 6, " Printed record filed. 8/9 Proof of service filed.
Nov. 2, " Plaintiff's printed brief and proof of service filed.
" 4, " Def't's (J. Shroder) printed brief and proof of service filed.
Dec. 12, " Def't's (C. B. M.) printed brief filed. 12/14, proof of service filed.
" 20, " Def't's (S. & M. *et al.*) printed brief and proof of service filed.
" 23, " Def't's (E. R. D. & C. H. A.) printed brief and proof of service filed.
Jan'y 18, 1905. Def't's (Kelley & H.) printed brief and proof of service filed.
Feb. 3, " Journal entry:

"This cause came on to be heard upon the *the* transcript of the record of the Circuit Court of Hamilton County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court that the judgment of the Circuit Court be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered

that the defendants in error recover from the plaintiff in error their costs herein expended, taxed at $—.

Ordered, that a Special Mandate be sent the Circuit Court of Hamilton County, to carry this judgment into execution."

Journal No. 20, page 159.

Feb. 6, 1905. Mandate Issued.
" " " Original Papers sent Clerk.
Mar. 7, " Entry of certification:

"On motion of said plaintiff in error, the Merchants National Bank of Cincinnati, Ohio, this Court ordered it to be certified and made part of the record in this case and of the judgment and entry of affirmance heretofore rendered and made herein, that in the rendition of said judgment of affirmance, it became and was material to the case to determine whether the plaintiff in error had power as a bank organized under the banking laws of the United States, under sections 5136 and 5137 of the Revised
105 Statutes of the United States, to be or become liable for nine-fortieths of the expenses of purchasing, managing, handling, holding, improving or disposing of the property of the Elsmere Syndicate, which was a partnership organized in Ohio for the purpose of dealing in a certain tract of land in said State.

And the court ordered it to be further certified that the plaintiff in error claim and ask this Court to hold that the said plaintiff in error, the Merchants' National Bank of Cincinnati had no power, under said sections of the Revised Statutes of the United States, to be or become liable for any part of said expenses.

And the Court order it to be further certified that the decision of the court was *was* against the plaintiff in error upon its said contention in this to-wit; that the plaintiff was not and could not become under said section a member of said partnership and thereby liable for the debts, or any portion thereof of said partnership, but held and so adjudged that plaintiff was an owner in severalty of 9/40 of the real estate alleged to be owned by the Elsmere Syndicate and that as such owner it did have power under said section to become liable for nine-fortieths of the expenses of purchasing, managing, handling, holding, improving and disposing of said real estate.

It is hereby further certified that this court is the highest court of law and equity in the State of Ohio in which a decision of this case can be had.".

Journal No. 20, page 195.

Mar.	7,	1905.	Petition in Error filed.
"	"	"	Assignment of Errors filed.
"	"	"	Bond in Duplicate filed.
"	"	"	Order allowing Writ of Error filed.
"	"	"	Citation Issued.
April	15,	"	Waivers of Citation filed.
"	"	"	Writ of Error filed.
"	"	"	Precipe for Transcript of Record filed.

106 Supreme Court of the State of Ohio.

STATE OF OHIO, }
City of Columbus. }

I, Lawson E. Emerson, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing Transcript of Record in the case of The Merchants National Bank of Cincinnati vs. Theresa J. Wehrmann, Executrix *et al.*, is a true and correct copy of the pleadings and papers taken from the Printed Records filed in the Supreme Court in said cause as set forth in the Precipe for Transcript of Record, copy of which is attached herewith.

I do further certify that the foregoing petition for writ of error assignment of errors, bond, order allowing writ of error, writ of error, citation and waivers of citation are the original papers filed in this court; that the foregoing Transcript of Docket and Journal Entries is truly taken and correctly copied from the records of said Court in said Cause.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 1st day of May, A. D., 1905.

[Seal the Supreme Court of the State of Ohio.]

LAWSON E. EMERSON,
Clerk, Supreme Court of Ohio.
By J. G. OBERMEYRE, *Deputy.*

Endorsed on cover: File No. 19,750. Ohio, supreme court. Term No. 256. The Merchants National Bank of Cincinnati, plaintiff in error, *vs.* Theresa J. Wehrmann, executrix of William F. Wehrmann, deceased, *et al.* Filed May 6th, 1905. File No. 19,750.

FILE COPY

Office Supreme Court U. S.
FILED
APR 2 1906
JAMES H. MCKENNEY,
Clerk.

No. 256.

Supreme Court of the United States

THE MERCHANTS NATIONAL BANK OF CINCINNATI,
Plaintiff in Error,

versus

THERESA J. WEHRMANN, Executrix of William F. Wehrmann, Deceased, et al,
Defendants in Error.

ON ERROR TO THE SUPREME COURT OF OHIO.

Brief for Plaintiff in Error.

W. C. HERRON,
Of Counsel for Plaintiff in Error.

THE COURT INDEX PRESS, Law Printers, 806 Main Street, Cincinnati, Ohio.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

THE MERCHANTS NATIONAL BANK OF CINCINNATI,

Plaintiff in Error.

No. 256. *vs.*

THERSEA J. WEHRMANN, Executrix of William F. Wehrmann, Deceased, et al.

Defendants in Error.

ON ERROR TO THE SUPREME COURT OF OHIO.

Brief for Plaintiff in Error.

THE RECORD.

This cause began by petition filed July 2, 1897, in the Common Pleas Court of Hamilton County, Ohio, by William F. Wehrmann against Frank B. McFarlan and a number of other persons and corporations, including the plaintiff in error, which petition is found on pages 16 to 19 of the Record.

In this petition the plaintiff alleged that the various defendants, including the plaintiff in error, were partners

doing business in the county of Hamilton and state of Ohio under the name of the Elsmere Syndicate; that said syndicate was formed on the 13th day of February, 1889, for the purpose of dealing in a large tract of land contiguous to the city of Cincinnati; that said syndicate carried on business for some years and finally became insolvent; that the plaintiff in error, at the time of said insolvency, was the owner of nine shares in said syndicate. The petition then prayed that the syndicate should be dissolved, that an accounting should be made between the partners, that a receiver should be appointed, and that its assets should be applied to the payments of its debts.

The case was referred to a master, whose report will be found from pages 20 to 26 of the Record, and the master found that the syndicate was a partnership and that the plaintiff in error was the owner of nine shares therein, and his report was confirmed by the Common Pleas Court of Hamilton County.

Subsequently, an appeal was taken to the Circuit Court of Hamilton County, which court rendered judgment on the 5th day of May, 1902, which judgment will be found on pages 37 to 45 of the Record. That court again found that the said syndicate was a partnership, that the plaintiff in error was the owner of nine shares, and liable as a partner for the debts of said syndicate. To that judgment a petition in error was taken to the Supreme Court of Ohio, and the opinion of that court will be found reported in the case of *The Merchants National Bank* v. *Wehrmann*, 69 O. S., 160. That court decided that the Elsmere Syndicate was a partnership and that the plaintiff in error became the owner of nine shares in said partnership; but that the plaintiff in error had no power, under the bank-

ing laws of the United States, to become a member of a partnership, and that, therefore, the legal effect of its ownership of said shares was to make it "a part owner in severalty of the property then owned by the partnership, and as such liable for nine-fortieth parts of the debts and expenses incurred in purchasing, holding, handling, managing, improving and disposing of said property." The case was remanded to the circuit court with instructions to determine the assets and liabilities of the Elsmere Syndicate, and to render a judgment against the plaintiff in error for nine-fortieths of the deficiency between said assets and liabilities. This judgment will be found on page 48 of the Record and was entered October 27, 1903.

The cause then went back to the Circuit Court of Hamilton County, where a judgment was rendered against the plaintiff in error for nine-fortieths of said deficiency, amounting to $9,167.13. The second judgment of the circuit court will be found on pages 57 to 63 of the Record. The case was then taken to the Supreme Court of Ohio, which affirmed the judgment of the circuit court without report. From this final judgment of the Supreme Court of Ohio, this petition in error is prosecuted.

THE FACTS.

The Elsmere Syndicate was organized by an agreement entered into January 25, 1889, which will be found on page 34 of the Record (Exhibit 4). By this agreement it was provided that the signers thereof should form a syndicate with a capital stock of $320,000, divided into forty shares, each party to take the number of shares set opposite to his signature to said agreement. That said

capital stock was to be used to purchase a tract of land in Hamilton county, which said land was to be improved and developed and finally sold. The fifth clause of the agreement provided as follows:

> "Fifth. After the cost of land, including the cost of making streets, advertising, etc., etc., shall have been paid out of the receipts for the sale of lots, then the receipts shall be considered net profits, and shall be divided among the shareholders equally, share and share alike."

The plaintiff in error was not a party to this agreement, but one F. B. McFarlan subscribed for several shares under said agreement. The real estate was purchased and conveyed to three persons as trustees, the conveyance appearing on page 30 of the Record (Exhibit 2). And, about the same time, a declaration of trust was executed, which appears on page 31 of the Record (Exhibit 3), between the various signers of the agreement and the three trustees, by which it is stated that the trustees are the owners of the said real estate, and of all the rents, issues and profits thereof, and have power to sell the same without any obligation upon the part of the purchasers to look to the application of the purchase money, and that the proceeds of sale, and the rents, issues and profits of the real estate are to be held upon the trust to pay all the expenses of surveying, sub-dividing and improving and selling the property; to pay the purchase money for the property as it falls due, and to pay the balance of the money realized from sales, etc., proportionately to the holders of certificates in the Elsmere Syndicate. About the same time the syndicate organized, and issued certificates to the various signers of the agreement, an example of which appears

on page 35 of the Record (Exhibit 6*a*), wherein it is recited:

> "This is to certify that .....is the owner of a one-fortieth interest in the Elsmere Syndicate; transferable in person or by attorney upon the books of the syndicate at its office in the city of Cincinnati upon the surrender of this certificate.
>
> "Witness our hands this ..... day of ....., ...
>
> "....,
>
> "....,
>
> "....,
>
> "Trustees."

By-laws were drawn up which appear on pages 36 and 37 of the Record, wherein the trustees are given expressly all the powers formerly given them by the declaration of trust, and also the power of general supervision over the affairs of the syndicate at a regular salary. The syndicate thereupon began the development of the property, and in so doing issued title bonds, an example of which appears on page 49 of the Record (Exhibit 58); warranty deeds, examples of which appear on page 48 of the Record (Exhibit 56), and page 51 of the Record (Exhibit 63); mortgages, an example of which appears on page 56 of the Record; and issued promissory notes, examples of which appear on pages 52 of the Record (Exhibit 68), and 53 of the Record (Exhibit 74). Every one of these obligations was issued by the trustees of the Elsmere Syndicate, and none of the persons who signed said agreement were parties to any of them.

On January 15, 1892, one Frank B. McFarlan, who had subscribed for certain shares under the original agree-

ment and had subsequently acquired others, so that, at that time, he claimed to be the owner of nine shares in said syndicate, being heavily indebted to the plaintiff in error, transferred said nine shares to W. W. Brown, trustee, and said shares stood in the name of said Brown, trustee, at the time of the insolvency of said syndicate. W. W. Brown was the cashier of the plaintiff in error, and, as the Supreme Court of Ohio has found that the effect of this transfer to him as trustee was to make the bank the owner, *de facto*, of these shares, that question is not open to further argument in this court, and it must be, therefore, assumed that on January 15, 1892, the plaintiff in error, in order to secure and save a pre-existing indebtedness, became the owner *de facto* of nine shares in the said Elsmere Syndicate.

THE LAW.

The question, therefore, now before this court is whether or not the plaintiff in error had power to take title to these shares in any way, so as to render itself liable for any part of the indebtedness of the Elsmere Syndicate. This point is raised by the first assignment of error, page 5 of the Record, which is:

> "First. The court erred in its construction of the banking laws of the United States, and specifically in its construction of Sections 5136 and 5137 of the Revised Statutes of the United States, relating to national banks, and in holding that the plaintiff in error, a corporation organized under said banking laws of the United States, had power, under such laws, and specifically under said Sections 5136 and 5137, to become liable for any part of the indebtedness of the Els-

mere Syndicate, a partnership dealing in real estate."

It may be noted, at the outset, that this objection was taken by the bank in the common pleas court, and has been raised in the proper manner in every court since (see Record 45; Record 47; Record 63; Record 64).

(*a*). It will undoubtedly be urged by counsel for the defendants in error, that no federal question is raised in this case, since the Supreme Court of Ohio decided the only federal question involved in favor of the plaintiff in error.

It is submitted, however, that this point is directly governed by the decision of this court in *The California Bank* v. *Kennedy*, 167 U. S., 362. The decision of the Supreme Court of California in that case is reported in *The Bank* v. *Kennedy*, 101 Cal., 495. The Supreme Court of California there held, that while a national bank had probably no power to take stock in a savings bank as an investment, it did have power to take such stock for some purposes, *e. g.*, as collateral security for a pre-existing debt, and that, having such power for some purposes, it was estopped, as against innocent third persons, to set up that it had not taken the stock for lawful purposes in that case. This court held that that decision of the Supreme Court of California raised a federal question, and in its decision this court went into the whole question of estoppel as well as of *ultra vires*, and held that the entire legal effect, under the statutes of the United States, of what the bank did, and its general liability under such statutes as against third persons, was a federal question reviewable in this court.

So, in the case at bar, what the Supreme Court of Ohio did, as indicated by a careful analysis of its opinion in the 69th Ohio State, 160, was to hold that the bank had no power to take these shares as a partner, but that it did have power to take the title to them for some purposes, and that "the legal effect" of its taking the title was to make it a part owner of the real estate of the syndicate, and as such liable for a proportion of the expenses incurred in developing that real estate.

The Supreme Court of Ohio distinctly held that the Elsmere Syndicate was a partnership and that the plaintiff in error took title to nine shares as a partner, just as, in the California bank case, the Supreme Court of California did not deny that, in fact, the California bank took the shares in question as an investment purely. The Supreme Court of Ohio held, however, that, as against third parties, the plaintiff in error must be taken to have acquired an interest in the real estate of the syndicate, and to be liable as a part owner thereof; just as the Supreme Court of California held that, as against third persons, the California Bank must be taken to have acquired the shares as collateral for a pre-existing indebtedness, and was estopped to set up the contrary. The nature of the ruling, therefore, in the California Bank case, and in the case at bar appear to be precisely the same upon principle, and to involve precisely the same federal question.

That the above is a true analysis of the decision of the Supreme Court of Ohio in 69 O. S., 160, appears clearly from the opinion of the court on page 169, where it is said:

> "The Merchants National Bank of Cincinnati is a corporation organized under the national

banking laws of the United States, and the Elsmere Syndicate was a partnership consisting of forty shares, each partner holding one or more shares, and each share evidenced by a certificate as shown in the foregoing statement of facts, and which certificates were transferable on the books of the syndicate, and such transfers were intended to make the transferee a partner in the syndicate instead of the transferor, without a dissolution of the partnership.

"The circuit court finds that the bank became owner by transfer of nine shares of this syndicate or partnership, which shares were taken by the bank to secure the payment of a large indebtedness owing to said bank for loans by it made to one of its customers in the usual course of business."

Continuing then to hold, at length, that the bank had no power under the national banking laws to take these shares as a partner, the court continued, on page 175, as follows:

"The bank having become the owner of these nine shares, and not having the power to become a partner, it became in legal effect a part owner of the property of the syndicate, which ownership was in its nature several, and the bank, * * * became and is liable for its share of the expenses of purchasing, managing, handling, holding, improving, and disposing of the property."

The holding was, therefore, that the bank intended to become a partner, and that the transfer of the shares to it would have made it a partner, had not the defense of *ultra vires* been interposed; that the defense of *ultra vires* was sufficient to exclude the bank from becoming a part-

ner, as it had intended to do, or to become liable as such partner, but that the defense was not sufficient to exclude the incidental legal effect of making the bank a part owner of the real estate, a position it never intended to occupy, and liable as such for its proportion of the liabilities of the syndicate. The federal question, therefore, clearly raised on the Record is as to the effect of the defense of *ultra vires* when pleaded by a national bank; whether that defense relieves it entirely from all liability, or whether liability may be placed upon it in another form so as to reach the same result. It is submitted, therefore, that the question raised in this case is precisely the same as the question raised in the California Bank case, and that the decision of this court upon the motion to dismiss in the California Bank case is decisive in this, so far as the existence of a federal question is concerned.

(*b*). Coming to the question of the merits of the case, the first question is whether the Supreme Court of Ohio gave to the defense of *ultra vires*, raised under the banking laws of the United States, its true and proper effect. Assuming that the bank intended to become a partner in the syndicate, as the Supreme Court of Ohio has held it did, and assuming that it had not the power under the banking laws of the United States to become a partner, can it be made liable in any other way by reason of its title to the nine shares in the syndicate?

This point, again, is distinctly concluded by the decision in *The California Bank* v. *Kennedy*. This court in that case, following a line of its own decisions, the most important of which is *The Central Transportation Company* v. *Pullman Palace Car Company*, 139 U. S., 24, held that a contract which is *ultra vires* is not voidable merely,

but absolutely void, and can produce no legal effect whatsoever either by way of acquiring title or by reason of any estoppel. A contract which is *ultra vires* is as though it had never been made, in so far as a party raising the defense is concerned. The decision in *The California Bank* v. *Kennedy* clearly intimates that no title passes under such an *ultra vires* transaction at all, and that *e. g.*, the California Bank acquired no title whatever to the shares of stock which it had no power to take, and could not, therefore, be made liable upon the supposition that it had acquired the title for any purpose or in any manner whatsoever. This court said, on page 369:

> "Stock so acquired creates no liability to the creditors of the corporation whose stock was attempted to be transferred."

The language "no liability" and "whose stock was attempted to be transferred," indicates clearly that this court conceived of the whole transaction as absolutely void, that the transfer of the stock to the California Bank was without any legal effect whatsoever, and could raise no liability of any kind, or to any extent, against the bank in favor of the creditors of the corporation.

The fallacy of the reasoning of the Supreme Court of Ohio in this case is obvious, and involves a begging of the whole question involved. After stating that the bank became the owner *de facto* of these shares, and after holding that it had no power to take these shares as a partner, it assumes, in the conclusion of its opinion, without any reasoning or citation of authority, that it could take the title to these shares for some other purpose, which the parties had never contemplated, and could, in law, make

itself liable in that way. It, therefore, assumes the whole question in issue. It decides (directly contrary to the decisions of this court), that an *ultra vires* contract is not entirely void, that title may pass under it, that a person acquiring shares under an *ultra vires* contract becomes the owner in law of them for some purposes, and may be liable to some extent as such owner. This court held directly the contrary in the California Bank case; and, applying the reasoning of that case to the case at bar, the conclusion is irresistible, that if the bank had no power to take the shares as partner, it could not make itself liable at all. It would not become the owner of the shares *de jure*, and, therefore, no consequential liability as such owner could be imposed upon it. The contract of purchase of the shares would be null and void, as though it never had been made; no title to the shares would pass to the bank, and no "legal effect" can be attributed to the transfer at all.

It is hardly necessary to call the court's attention to the fact that the decision of the Supreme Court of Ohio results in an anomalous and novel situation. There can be no question that the Elsmere Syndicate was a partnership. The facts set forth in the earlier part of this brief show this clearly, and the provisions of the fifth paragraph of the agreement are specific upon that point. The title to the real estate was in the trustees, and not in the members of the syndicate, and the entire business of the syndicate was carried on by these trustees as indicated in the obligations issued by them and referred to hereinbefore. The certificates issued expressly give an interest merely in the Elsmere Syndicate. They do not purport to give any interest in land, or any title to a part interest in the

land, but simply to give an interest in the net profits resulting from the disposition of the land. The result contemplated by the parties and actually attained by the papers they executed, was the creation of a partnership dealing in real estate, whose interests were managed by three trustees, elected by the partners in whose name was the legal title to all of the real estate. The decision of the Supreme Court of Ohio, going directly contrary to the intention of the parties, disregarding all of these agreements, deeds, certificates, etc., results in the creation of a partnership as to thirty-one-fortieths interest in the syndicate, the holders of which interest are *inter se* partners, controlled by three trustees, and a nine-fortieths interest in the real estate itself, held by the plaintiff in error. No such legal relationship was ever heard of before, no such relation was contemplated by the parties, and the result can not but suggest a compromise upon the part of the Supreme Court of Ohio in order to make the plaintiff in error liable in some way. The doctrine of *ultra vires* must be applied to the facts as they are found; that is, the facts must first be determined as to what contract the parties intended, and the defense of *ultra vires* must be applied to those facts. In the case at bar, the Supreme Court of Ohio, not disputing the facts as stated above, nor that the syndicate was a partnership, nor that the bank intended to become a partner therein, instead of applying the defense of *ultra vires* to these facts so found, used the defense of *ultra vires* to produce a result not contemplated by any of the parties and reaching a result unknown to the law. No reason is given by the Supreme Court of Ohio for its holding, that, since the plaintiff in error could not become a partner, the "legal effect" of the transaction was

to make it a part owner of real estate, and the result reached is directly contrary to the California Bank case, and directly contrary to all sound legal doctrine.

It is submitted, therefore, that if the plaintiff in error had no power, under the circumstances of this case, to take these shares as a partner, it could not become liable in any way for any part of the indebtedness of the partnership.

(*c*). That the plaintiff in error had no power, under the banking laws of the United States, to become a member of a partnership dealing in real estate, even for the purpose of securing a pre-existing indebtedness, is decided in the case of *The First National Bank of Ottawa* v. *Converse, Receiver*, decided by this court on February 19, 1906. This court there held that a bank, even to secure a pre-existing indebtedness, had no power to engage in a speculative enterprise. What was done by the bank in that case was much less than what was done by the plaintiff in error in this case. To take preferred stock in a corporation organized for the purpose of purchasing the assets of another corporation, and carrying on its business, is certainly much less speculative than to take an interest in a partnership dealing in real estate, and to thus open the door to an unlimited liability sufficient, in many cases, to ruin the strongest bank.

It is submitted, therefore—

First. That the whole question of the effect of the plaintiff in error's becoming the owner of these shares *de facto*, and of the effect of the defense of *ultra vires*, whether it renders the whole contract void, or whether it may form the basis for some consequential liability, is a federal question, according to the decision in *The California Bank* v. *Kennedy*.

Second. That if the plaintiff in error took these shares intending to be a partner, and to have an interest only in the net profits of the syndicate, and if the plaintiff in error had no power to take the shares in that way, no title to the shares passed to it at all, the whole transaction was void, and no liability of any sort can be imposed upon the plaintiff in error according to the decision in *The California Bank* v. *Kennedy.*

Third. That the plaintiff in error had no power, even to secure a pre-existing indebtedness, to take title to shares in a partnership dealing in land, or to make itself liable for any part of the indebtedness of such a partnership, according to the decision in *The First National Bank of Ottawa* v. *Converse, Receiver.*

Respectfully submitted,

W. C. HERRON,

Of Counsel for Plaintiff in Error.

FILE COPY.

(19,750)

SUPREME COURT OF THE UNITED STATES.

No. 256.

Office Supreme Court U. S.
FILED
MAR 30 1906
JAMES H. McKENNEY,
Clerk.

THE MERCHANTS NATIONAL BANK OF CINCINNATI,

PLAINTIFF IN ERROR,

vs.

THERESA J. WEHRMAN, EXECUTRIX OF WILLIAM F. WEHRMAN, DECEASED, AND OTHERS,

DEFENDANTS IN ERROR.

Error to the Supreme Court of the State of Ohio.

BRIEF FOR CERTAIN DEFENDANTS IN ERROR.

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DEFENDANTS IN ERROR.

Error to the Supreme Court of the State of Ohio.

BRIEF FOR CERTAIN DEFENDANTS IN ERROR.

This case comes up on a writ of error in the Supreme Court of the State of Ohio, seeking to correct alleged errors in the record of a judgment against The Merchants National Bank of Cincinnati, plaintiff in error.

STATEMENT.

The original action was brought by the filing of a petition (the initial pleading in the case under the Ohio Code) filed by William F. Wherman, then in life, against Frank B. McFarland, Myron A. Spencer, James McArdle, Jr., and a number of other defendants, among whom was the present plaintiff in error. (Record, p. 16.)

The petition states that certain of the defendants had entered into a contract of partnership on or about the thirteenth day of February, 1889, for the purpose of forming a syndicate and dealing in lands, and that the interests in said partnership were represented by certificates given to each holder of an interest of a certain share or number of shares. The contract under which these partners associated themselves is as follows: (Record, 34.)

AGREEMENT.

We, the undersigned, in consideration of the mutual agreements herein contained, severally agree, as follows:

First. That we will form a syndicate with a capital stock of $320,000.00, divided into 40 shares, of par value of $8000.00 each, and we will take the shares as subscribed by us.

Second. With said capital stock it is agreed to purchase a certain tract of land lying in Section No. 33, Columbia township, Hamilton county, Ohio, as per plat hereunto attached, said tract containing 160 acres, more or less, the purchase price for same to be $300,000.00, payable $100,000.00 cash, and the balance ($200,000.00) on ten-year four

per cent. ground rent, with privilege of purchase at any time, interest payable quarterly.

Third. The balance of said capital stock, amounting to $20,000.00, shall be used for the improvement and development of said land, and for the expenses incidental to the management, control and sale thereof.

Fourth. The shares of said stock are to be paid for as follows: The sum of $300.00 per share immediately on signing this agreement; the sum of $2300.00 immediately after all shares are taken; the sum of $400.00 in sixty days after all shares are taken; the balance of $5000.00 on each share to be paid out of the proceeds of lots.

Fifth. After the cost of land, including the cost of making streets, advertising, etc., etc., shall have been paid out of the receipts for the sale of lots, then the receipts will be considered net profits, and shall be divided among the shareholders equally, share and share alike.

Sixth. Subscriptions to be binding only in case all the forty shares are taken within fifteen days from the date hereof. Otherwise, said first payment of $300.00 on each share to be returned.

Cincinnati, Ohio, January 25, 1889.

Name.	No. Shares.	Amount.	Paid.
M. A. Spencer	3	$24,000 00	$900 00
John Woltz	5	40,000 00	1500 00
J. E. Brown	1	8,000 00	300 00
Rudolph Gohs	3	24,000 00	900 00
John Brokamp	3	24,000 00	900 00
James McArdle	1	8,000 00	300 00
F. B. McFarlan	1	8,000 00	300 00
Joseph Taylor & Co.	1	8,000 00	300 00
H. W. Meier	1	8,000 00	300 00
H. H. Lippelmann	1	8,000 00	300 00
H. D. Brown	1	8,000 00	300 00
Rebecca K. Brown	1	8,000 00	300 00
F. B. McFarlan	1	8,000 00	300 00
Gertrude Marcus, per M. Marcus, attorney	1	8,000 00	300 00
J. E. Fisher	2	16,000 00	600 00
F. B. McFarlan	1	8,000 00	300 00
Anna L. McFarlan, by F. B. McFarlan, attorney	1	8,000 00	300 00
Jno. M. Bolan	1	8,000 00	300 00
Peter J. Dunn	1	8,000 00	300 00
Woltz & Williamson	1	8,000 00	300 00
Phillas J. Woltz	2	16,000 00	600 00
Gertrude A. Spencer	1	8,000 00	300 00
Geo. M. A. Spencer	1	8,000 00	300 00
Wm. F. Wehrman	1	8,000 00	300 00
F. B. McFarlan	1	8,000 00	300 00
H. L. Taylor	1	8,000 00	300 00
Benjamin F. Wehrman	1	8,000 00	300 00
Brown & Woltz	1	8,000 00	300 00

The form of certificate given to the partners is Exhibit 6*a* (Rec., 35), and is as follows:

THE ELSMERE SYNDICATE.

Investment, $320,000. Paid up, $120,000.

No. ——. Non-assessable.

This is to certify that ——— ——— is the owner of a 1-40 interest in The Elsmere Syndicate. Transferable in person or by attorney upon the books of the syndicate at its office in the city of Cincinnati, upon the surrender of this certificate.

Witness our hands this ——— day of ———.

_____

_____

_____

Trustees.

Countersigned:

_____

Secretary and Treasurer.

For value received, ——— ——— sells to ——— ———, the interest above mentioned, and authorizes ———, attorney, to transfer the same on the books of the company.

In presence of:

_____

_____

The by-laws of the syndicate (Rec., 36) were in the following words:

BY-LAWS OF THE ELSMERE SYNDICATE.

THE OFFICERS.

The officers shall consist of a president, vice-president, secretary, treasurer and three trustees. The present trustees

shall remain in office during the life of the syndicate, unless impeached for wrong-doing, by a majority in interest of all the members; or if one or more should resign or die, then the place or places in any event, made vacant, to be filled by a majority in interest.

THE PRESIDENT.

The president shall preside at all meetings of the syndicate, and in his absence that duty shall devolve upon the vice-president.

THE SECRETARY.

The secretary shall keep a record of all the meetings of the syndicate and its trustees; keep the accounts of the syndicate and perform such other duties as the trustees may from time to time require of him. He shall receive a salary of $50 per month, payable monthly.

THE TREASURER.

The treasurer shall collect and receive all moneys of the syndicate, and pay out the same only on the order in writing of a majority of the trustees. He shall at all times keep his books open to the inspection of the trustees, and shall render to them an itemized statement of his receipts and expenditures at least once in each and every month, and oftener if required, and shall perform such other duties as may be required of him by the trustees. He shall give bond for the faithful discharge of his duties and proper accounting of moneys coming into his hands in the sum of $50,000, with security to be approved by the syndicate.

THE TRUSTEES.

The trustees shall have all the powers given them by and through a "Declaration of Trust," heretofore made and

signed; they shall sign all orders for the payment of money; make and execute all contracts of the syndicate in its behalf; hold all official bonds given by officers and others to the syndicate, and have general supervision over the affairs of the syndicate, with power to employ counsel at a reasonable fee, and contract with agents for the sale of the syndicate property. They shall receive a salary of $500.00 each, the year commencing May 1, 1889, unless the sales of property of the syndicate during said year (beginning May 1, 1889, and ending May, 1890,) shall exceed $400,000..00, in which event their salary shall be $1000.00 each instead of $500.00. Their salary for subsequent years shall be fixed at each annual meeting of the syndicate.

MEETINGS OF THE MEMBERS.

Annual meetings of the syndicate shall be held on the first Monday in April in each year, and such other meetings shall be held from time to time as in the opinion of the trustees are necessary, or meetings may be called at any time on the request of shareholders representing at least one-third of the shares. The president, vice-president, secretary and treasurer, shall be elected at the annual meetings, and such other business may be disposed of at any and all meetings as may be presented. At all meetings each shareholder shall be entitled to one vote for each share of stock held by him and a majority in interest so voting shall govern.

The petition then goes on to state that the said syndicate was organized for the purpose of taking a leasehold interest in a large quantity of land contiguous to the city of Cincinnati, owned by Joseph and G. W. B. Cleneay, which said lease required the payment of all taxes and assessments and of certain ground rent payable quarterly, and that the said

leasehold interest was vested in trustees for the use of the members of said syndicate, and for the purpose of making sales and deeds, and said lease contained a clause that the owner should join in a plat of said property, that individual lots might be sold and conveyed upon the payment to the Cleneays of a certain amount for each lot, and that thereafter a plat was accordingly made subdividing said property into lots and laying out streets. That thereafter the said partnership commenced to do business and sell lots, and did sell a large number of lots, and gave deeds for the same when they were purchased on deferred payments, and continued this business up to about the fifteenth day of June, 1896, when, under foreclosure proceedings for back rents and unpaid taxes that had accrued, the said Cleneays sold the interest of said syndicate in said leasehold at judicial sale in the Circuit Court of the United States for the Southern District of Ohio, Western Division, and that the said Cleneays purchased in said leasehold interest, and that thereafter the said syndicate or partnership had no further interest therein.

It is further alleged that for about three years prior to the sale as aforesaid, the trustees of said syndicate had not been able to make any considerable number of sales of lots, whereas the expenses of maintaining the same were large, and the said syndicate members, as a syndicate, became largely involved in debt, and a large number of members of the syndicate were giving the matter no attention, and declined to aid in any manner with funds, and as a consequence said syndicate became insolvent and lost substantialy all of its assets; but that certain other members of the syndicate, being anxious to maintain the same until the times should improve, and thinking they would thereby subserve the interests of all concerned and prevent the loss of the leasehold property

and would enable them thereafter to make sales and resume business, and with the full knowledge and consent of all the members of said syndicate, and at the express desire and request of the trustees thereof, to wit, M. A. Spencer, Frank B. McFarlan and James McArdle, Jr., and an advisory committee of which the vice-president of the said Merchants National Bank was one, raised moneys for the use and benefit of said syndicate by borrowing money; and that the said loans were necessary to save said shareholders from loss.

The petition then sets out the names of the owners of shares at the time of the filing of the petition, of which shares the Merchants National Bank is alleged to own nine; that the said syndicate had ceased to do business and had become insolvent and had lost substantially all of its property and was not able to further prosecute its business and ought to be dissolved and a receiver appointed and an account taken.

Thereupon the plaintiff prayed the court to dissolve and wind up the said syndicate, to state an account of the said partnership affairs and to find the amount of its debts, to appoint a receiver of the assets thereof, and generally to direct the payment of its debts.

The answer of the Merchants National Bank (Rec., 19) was substantially a denial of the allegations of this petition and does not allege any particular ground of want of power on the part of the bank, but does deny as a fact that it formed any syndicate or partnership with the plaintiff, or became a member of any syndicate known as the Elsmere Syndicate.

The lease of the Cleneays and the deeds vesting title in the trustees of the syndicate are Exhibits 1, 2 and 3, at pages 27, 30 and 31 of the Record. The case was tried in the Court

of Common Pleas of Hamilton county, in said state, and for the purpose of stating the account was referred to a master, whose report is found on page 20 of the printed Record.

The character of the claims is shown by that report, and the names of the shareholders and the number of shares held by each are also set forth. Upon the coming in of that master's report, a judgment was rendered against the various defendants, including the Merchants National Bank, and the case was thereupon appealed and tried in the Circuit Court, the court of errors and appeals inferior to the Supreme Court, and the judgment of that court is found in the transcript, commencing on page 37 of the Record, and in it, on page 38 of the Record, the following findings of fact are made with reference to the interest of the Merchants National Bank, plaintiff in error:

> "That the shares standing in the name of W. W. Brown, trustee, are the shares of the Merchants National Bank, originally held by it as collateral, but transferred to it as owner when they were transferred to said Brown; that when so transferred the notes for which they had been held as collateral were surrendered, and the said shares were entered on the books of the bank as owned by the bank, and so reported to the United States government, and the bank, through its vice-president, took part in the management of the said syndicate and in the effort to preserve its property from sacrifice and loss, and all this was done with the knowledge and acquiescence of the board of directors of said bank."

The Federal Question.

Whatever federal question there is in the case arises from the fact that the plaintiff in error is a national bank organized under the acts of congress, and in connection with the fact that it challenged its right under those acts to enter into a partnership. Any federal question that would arise merely from the status of the plaintiff in error, or in other words, the mere fact that it was a national bank, is removed from the case by

25 U. S. Statutes at Large, 433.

The answer filed in the Court of Common Pleas (Rec. 19) does not in any way expressly deny its power to become a member of the Elsmere Syndicate or partnership, but simply denies the fact.

The motion for a new trial (Rec. 45), as the fourth ground of said motion, says:

> "Because the said The Merchants National Bank is a corporation organized under the banking laws of the United States, and the decision rendered herein is to the effect that such a corporation has power to be or become the member of a partnership."

The case was twice in the Supreme Court of the state; first, on a petition in error filed September 2, 1902, and the errors complained of were:

First. That the court erred in finding that the plaintiff in error was the owner of nine shares in the so-called Elsmere Syndicate.

Second. The court erred in finding that said shares had been transferred to the plaintiff in error as the owner thereof, and not merely as the pledgee thereof.

Third. The court erred in finding that the plaintiff in error was a partner in the partnership known as the Elsmere Syndicate.

Fourth. The court erred in its construction of the banking laws of the United States, and in its holding that the plaintiff in error, a corporation organized under the banking laws of the United States, had power, under such laws, to be and become a member of a partnership dealing in real estate.

Fifth. The court erred in its construction of the said banking laws of the United States in holding that under such laws the board of directors of the plaintiff in error had power, without the assent of the stockholders of the plaintiff in error, to cause the plaintiff in error to be or become a member of a partnership dealing in real estate.

Sixth. The court erred in finding that the board of directors of the plaintiff in error knew of or assented to the plaintiff in error becoming a member of a partnership dealing in real estate.

Seventh. The court erred in overruling the exceptions of the plaintiff in error to the master's report filed in said court.

Eighth. The court erred in overruling the motion of the plaintiff in error for a new trial.

Ninth. The court erred in decreeing and finding that the plaintiff in error should pay the said sum of $17,002.82.

Tenth. The court erred in not dismissing the plaintiff in error from the said case.

The only errors complained of that relate to the powers of the plaintiff in error are the fourth and fifth, and they both relate to alleged error committed by the court below in holding that the plaintiff in error could become a member of a partnership dealing in real estate.

The case was reversed on this first petition in error. See, Merchants Nat. Bank vs. Wehrman, 69 O. S., 160.

The court expressly upholding the contention of the plaintiff in error that it could not become a member of a partnership, thus upholding the claim of immunity or right set up in the pleadings of and contended for by the bank, but did proceed to hold that

> "The bank having become the owner of these nine shares, and not having the power to become a partner, it became in legal effect, a part owner of the property of the syldicate, which ownership was in its nature several, and the bank, through its trustee, having managed this several interest in connection with the trustees of the other shares as to their interests, the bank became and is liable for its said share of the expenses of purchasing, managing, handling, holding, improving, and disposing of the property. The bank is thus liable for nine-fortieth parts of the debts and expenses remaining after applying the proceeds of the property upon the indebtedness."

This was grounded upon the finding of the Circuit Court upon the question of the ownership and manner of acquisition of those shares by the bank as contained in the findings of the Circuit Court.

The case was then remanded to the Circuit Court of Hamilton county and re-tried upon the question of the amount of indebtedness of the Syndicate, and the Bank's proportion thereof, and a second decree was entered (Rec. 57), which modified the former decree of the Circuit Court in

the respects commanded by the Supreme Court, but provided (Rec. 62), "In all other respects said original decree shall stand as originaliy entered with only the modification herein provided for."

And in the second motion for a new trial (Rec. 63) this ground is stated:

> "Fourth. The defendant, The Merchants National Bank, is a corporation organized under the banking laws of the United States, and as such corporation could not, under the provisions of said laws, be held liable for any proportion of the debts and liabilities of the partnership known as The Elsmere Syndicate."

In the petition in error filed to reverse that judgment, the first, second, third and fourth errors complained of relate to the alleged error of a misconstruction of the banking laws of the United States, the effect of which errors is summed up in the fifth alleged ground as having culminated in an error in finding and decreeing that the plaintiff in error was liable for any part of the debts and liabilities of the Elsmere Syndicate prior to the fifteenth day of January, 1892. The first three items seem, however, to relate to the contention that had been carried through the earlier phases of the case that the Bank could not become a member of a partnership. In this matter, by reason of the section of the Revised Statutes already cited, all special immunity arising out of the fact that the plaintiff in error is a national bank is removed, and it is assimilated to the status of an ordinary corporation, and therefore all that it can complain of as involving a federal question could only arise out of a misconstruction of the Acts of Congress (Sections 5136, 5137), whereby it was deprived of some immunity or right accorded to it by those sections.

The sections of the Revised Statutes, which it is claimed the Supreme Court of the State of Ohio misapplied and misconstrued and out of which the federal questions involved in this case arise, are 5136 and 5137; but the only questions that were made by the pleadings and in the trials in the courts below were whether or not the Merchants National Bank, by the ownership of certain shares in the Syndicate, could become a partner therein and liable for its debts, which, on page 172 of the 69th O. S., is defined to be a liability, not only for its own share of the debts of the firm, but also the debts of its co-partners.

At no time was it suggested that there was any distinction between the debts until after the case had been tried in the Circuit Court of Hamilton county for the second time in carrying out the judgment of the Supreme Court. It was then claimed in the second petition in error in the fifth assignment of error (Rec. 65) that the plaintiff in error was not liable for any debts and liabilities of the Syndicate that accrued prior to the fifteenth day of January, 1892, but there is no evidence other than may be inferred from the master's report, the other evidence being absent from the record, that any indebtedness arose before that date, and nothing whatever in any of the judgments contained in the record that would show that that date cut any figure in the case whatever, or that any prior indebtedness was allowed, or was made to appear otherwise than by mere argument, but as the whole contention had been that the Merchants National Bank could not be a partner, therefore it could not be liable for any of the debts. The contention that it was not liable for the debts prior to January 15, 1892, is a severance of its liabilities and an abandonment of its position that

the whole thing depended upon whether or not the bank could be a partner, and a tacit admission that it might be liable after that date, whereas if the sections of the Revised Statutes excused it, it must have been excused *in toto*.

It is not a federal question unless some privilege or immunity or right secured to it by that or other sections of the Revised Statutes is denied it. The mere ordinary making of contracts and conducting the business of the bank and the obligations that ensue either from contract or from tort are not a federal question. Nobody denies that a corporation, whether under the Revised Acts of the United States, or other acts of the state legislature cannot perform acts *ultra vires*, but the Section (5136) expressly permits the making of contracts, and the exercise of all powers appertaining to such companies that are usual and incidental to the carrying on of the business for which they are chartered and the application of the rules of common law and equity to its acts follow as a matter of course. The application of these rules does not raise a federal question.

See,

Inez Mining Co. vs. Kinney, 46 Fed., 832.

The reasoning in

Texas & Pacific Railroad Co. vs. Cody, 166 U. S., 606, and
Tex. & Pac. R. R. Co. vs. Barrett, 166 U. S., 617,

does not apply in this case because of the deprivation of the right to litigate in the United States Court from the mere fact that the party is a national bank. In

Allen vs. Arguimbau, 198 U. S., 149,

it was held that

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the

other not, and it does not appear on which of the two the judgment was based and the ground independent of a federal question, is sufficient in itself to sustain it, this court will not take jurisdiction.

"The certificate of the chief justice of the Supreme Court of the state on the allowance of the writ of error that the judgment denied a title, right or immunity specially set up under the statutes of the United States, cannot in itself confer jurisdiction on this court.

"Plaintiff in error contended as defendant in the state court, which overruled the plea, that his notes were void because given in pursuance of a contract which involved the violation of Sections 3390, 3393, 3397, Rev. Stat., providing for the collection of revenue on manufactured tobacco. Held, that as an individual can derive no personal right under those sections to enforce repudiation of his notes, even though they might be illegal and void as against public policy, the defense did not amount to the setting up by, and decision against, the maker of the notes of a right, privilege or immunity under a statute of the United States, within the meaning of Section 709, Rev. Stat., and the writ of error was dismissed."

And in

Leonard vs. V. S. & P. R. R. Co., 193 U. S., 416,

the syllabus reads:

"The rule reiterated that persons may by their acts or omissions to act, waive rights which they might otherwise have under the constitution and laws of the United States; and the question whether they have or have not lost such rights by their failure to act, or by their action, is not a federal question."

"The judgment in this case rested on grounds broad enough to sustain it independent of any federal question."

And in

Pierce vs. Somerset Ry., 171 U. S., 641-648,

this court said:

> "A person may by his acts or omission to act waive a right which he might otherwise have under the constitution of the United States as well as under a statute, and the question of whether he has or has not lost such right by his failure to act or by his action, is not a federal one."

And,

Eustis vs. Boles, 150, U. S., 361;
Seneca Nation vs. Christy, 162 U. S., 283;
Gillins vs. Stinchfield, 159 U. S., 658;
Speed vs. McCarthy, 181 U. S., 269,

are all examples of waiver or estoppel in such cases or a bar of the state statute, and in fact, the rules of common law and equity, or the rule established by local custom or statute equally fail to give rise to any such question provided the validity of the statute, or construction of the statute itself is not in question. In

Pa. R. R. Co. vs. Hughes, 191 U. S., 477,

it was held:

> "That the jurisdiction of this court to review a judgment of a state court under Section 709, U. S. Revised Statutes, depends upon the assertion of a right, privilege or immunity under the federal constitution or laws set up and denied in the state courts.
>
> "Held that the highest court of a state may administer the common law according to its own understanding and interpretation thereof, being only amenable to review in this court where some immunity or privilege created by the federal power has been asserted and denied.
>
> "Held that while congress under its power may provide for contracts for interstate commerce permitting the carrier to limit its liability to a stipulated valuation,

it does not appear that congress has, up to the present time, sanctioned contracts of this nature; and, in the absence of congressional legislation on the subject, a state may require common carriers, although in the execution of interstate business, to be liable for the whole loss resulting from their own negligence, a contract to the contrary notwithstanding.

"There is no difference in the application of a principle based on the manner in which a state requires a degree of care and responsibility whether enacted into a statute or resulting from the rules of law enforced in its courts."

Although it is the usual rule in matters that relate to interstate commerce that where congress has been silent on the subject, that means that commerce is to be untrammeled by state regulations.

In

C. I. & L. R. R. Co. vs. McGuire, 196 U. S., 128,

it is held that if the Supreme Court fails to consider the question because it has not been properly made in the court below, then this court will not review its judgment, unless it appears that the validity of the statute was necessarily involved. And in

Supply Co. vs. Light & Power Co., 197 U. S., 299,

where it was claimed that service upon an agent of a corporation was not sufficient service, which was upheld by the lower court in South Carolina, but afterwards reversed by the Supreme Court, and thereupon it was claimed that the agent was not such an agent as to bring the corporation, which was a foreign corporation, into court, and was not due process of law, but the Supreme Court declined to consider the question presumably because it had not been made prior to its first decision, that this court would not review it because, even though it were a federal question, the State

Supreme Court might very well decline to consider it when not made in time. In

Harding vs. Illinois, 196 U. S., 78,

it is said that this court will not reverse the judgment of a state court holding an alleged federal constitutional objection waived, where the record discloses that no authority was cited or argument advanced in its support and it is clear that the decision was based upon other than federal grounds and the constitutional question was not decided. On page 86 the court quoted from Capital City Dairy Co. vs. Ohio, 183 U. S., 238, as follows:

> "It is well settled that this court, on error to a state court, can not consider an alleged federal question, when it appears that the federal right thus relied upon had not been by adequate specification called to the attention of the state court and had not been by it considered, not being necessarily involved in the determination of the cause."

And this, although the state court certified as to the existence of the federal questions which had been called to its attention and which it had decided, no reference being made, however, in the certificate, to the claim of federal right that they were then considering. In this case the vague objections taken may be applied to the objections taken in the case at bar. In

Shoshone Mining Co. vs. Rutter, 177 U. S., 505,

it was held that an adverse suit authorized by the statutes of congress in the case of mining property is not sufficient necessarily to vest jurisdiction in the federal courts; and in

Telluride Power Co. vs. Rio Grande & Western R. R., 176 U. S., 139,

it is said that the jurisdiction of this court in cases brought up by writ of error to a state court, does not extend to

questions of fact or of local law, which are merely preliminary to, or the possible basis of, a federal question.

And in

> Cook County vs. Calumet & Chicago Canal Co., 138 U. S., 635-53,

this court says:

> "The validity of a statute is not drawn into question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

Privileges and immunities are more properly applied to general attributes that may be said to attach on account of the status of the party. It is a privilege of a national bank to be a corporation and to transact banking business. It is an immunity to be free from taxation except at the same rate as other moneyed capital in the state where the bank is located, but it is neither a privilege nor an immunity to be free from the obligations of a contract or the consequence of a tort. So far from that, the sections of the acts of congress cited expressly permit banks to make contracts and do all other acts usually incident to the carrying on of that particular business.

Nobody has ever disputed in this case that the bank in common with other corporations is not bound, in a legal sense, by contracts beyond the scope of its charter powers—in other words, ultra vires. But when a contract is legal, the results that follow are those that usually follow such contracts in other cases, and the validity of the contract and its obligation depend upon the ordinary principles of the statutory or common law of the state. For instance, whether a contract is valid under the Statute of Frauds is not a

federal question, nor is the question whether the bank is estopped a federal question.

In this case, the papers executed by the parties made out a parnership.

Clagget vs. Kilbourne, 1 Black U. S., 346;
Yeoman vs. Leslie, 46 O. S., 190;
Hulitt vs. Fairbanks, 40 O. S., 233;
McFadden vs. Leeka, 48 O. S., 513;
Chester vs. Dickinson, 54 N. Y., 1;
Batty vs. Adams Co., 16 Neb., 44;
Robins vs. Butler, 24 Ill., 387;
Heirs of Ludlow vs. Cooper's Devisees, 4 O. S., 1.

Of these, the cases in 24 Illinois and 1st Black are almost identical in their circumstances with the case at bar. There was a trust in lands to be managed and marketed as a commercial transaction for the benefit of others, and they held that there was a partnership and that the persons were liable for the obligations incurred.

A partnership may exist with transferrable shares.

Wadsworth vs. Dunn, 164 Ill., 360;
Wells vs. Wilson, 3 Ohio, 425;
Rianhard vs. Hovey, 13 Ohio, 300;
Jones vs. Clark, 42 Cal., 180;
Lingley on Partnership, 363, Sec. 5 on Transfer of Shares.

In such cases, where it was a part of the original agreement that the interest of the partners should be evidenced by certificates of ownership analogous to a certificate of stock which might pass from hand to hand and be transferred on the books of the company to the transferee who for all purposes takes the place of the original subscriber, it can hardly be questioned that the result contemplated and contracted for follows, and that there is not a dissolution

such as arises where one partner, without the consent or knowledge of, and without any previous arrangement with, his partners, sells his interest or becomes bankrupt. The latter result has been put upon the ground that an ordinary contract of partnership is a single contract between definite persons and that as against the will of some, one can not, in a relationship of personal confidence, substitute some third person for himself and therefore, necessarily, a dissolution occurs, but where, as in the case at bar, all parties agree that the interest of one might be transferred on the books of the company by transferring his certificate of ownership and that they will receive the transferee as one of their number, there is no reason and no necessity for dissolution. This is easier to reconcile with the principles of law in our case, because the management had been committed to, and the confidence had been reposed in the trustees. The persons thus had nothing to do with the active management of the affairs of the syndicate other than as equitable owners and subject to the deeds and declaration of trust and by-laws, they might, by a majority counsel, but not direct, and therefore that delectus personae, that is the privilege of choice of each member of an ordinary partnership was of no importance here.

In such a partnership, the indebtedness of the partnership follows the interest transferred like a transfer of a share of the stock as is said in

Brown vs. Hitchcock, 36 O. S., 667;
Lindley on Companies (6th Ed.), 665;
Mayhew's case, 5 DeG. McN. & G., 848;
Wells vs. Wilson, 3 O., 425.

In the case of

Rianhard vs. Hovey, 13 O., 300,

the result did not follow because the obligations were not within the scope of the partnership business and therefore were held to bind those only who were cognizant of the proceedings and by silence or positive act assented thereto.

The Circuit Court found in that part of the judgment already quoted that the Merchants National Bank had held the nine shares in the name of W. W. Brown, first as collateral, and then became the owner thereof. In

First Nat. Bank vs. Nat. Exchange Co., 92 U. S., 122,

it is held that a bank in working out its security may do, in that behalf, whatever other persons may do under like circumstances. It is not necessary for us in this case to resort to the decision of National Bank vs. Case, 99 U. S., 629, nor to go that far. In that case it was held that where a national bank became the owner of stock in another bank in the process of saving its debt, it thereby had the status of a stockholder impressed upon it with all the usual results. In this case it was at first claimed that the bank, having become the owner legally of these shares, assumed thereby the status of a partner with all its attendant results, including the liability for all the debts of the enterprise. But this point was decided in favor of the bank by the Supreme Court of Ohio. The pertinency of the claim consisted in the fact that they were only holders of twenty-three shares, who were solvent, instead of forty at the final outcome, and the bank was, by the court below, held liable for nine twenty-thirds (9-23) instead of nine-fortieths (9-40).

The Supreme Court of Ohio proceeded upon the theory as its opinion discloses, that the bank, having become legally

the owner of this nine-fortieths interest, and having, as the Circuit Court found, taken part in the management of the syndicate through its vice-president, and in the effort to preserve its property from sacrifice and loss, and that all of this was done with the knowledge and acquiescence of the board of directors of the bank, it was liable for its share as the owner of nine-fortieths of the amount for the same proportion of those debts which had been incurred in that effort to save the property. The debts were for ground rents, taxes, etc., etc., and during all the time that this was going on the bank sat by and received the moneys paid in on title bonds and agreed, according to the finding, that these moneys should be applied to the purpose specified in the decree of the Circuit Court. These certificates obligated the holders to pay $8000.00. Only $3000.00 was ever paid on them, so that when the bank became the owner of them, there was that obligation to pay a large additional amount, much more on its nine shares than was ever charged to the bank on the wind up, and while it is true that as between the certificate holders that was to be one of the proceeds of the property, yet that became impossible, and in any event never bound the creditors.

There never was any suggestion prior to the filing of the second petition in error in the Supreme Court of Ohio that any distinction was to be drawn between the character of the debts incurred by the Syndicate, and the whole defense originally was based upon the theory that by reason of the acts of congress, the bank was not liable for any of the indebtedness. It never admitted that it was a part owner of shares and was liable for a part, and not liable for the other part of the debts, but its whole attitude was an entire denial

of the partnership relation and a consequent total exemption from liability, and it is utterly inconsistent to change that to a confession and avoidance—by confessing the ownership of the shares and seeking a separation of the debts and classifying them and claiming exemption from a portion. In

Cyclopedia of Law and Procedure, Vol. 2, 670,

it is said:

> "One of the most important results of the rule that questions which are not raised in the court below cannot be raised in the Appellante Court is that a party cannot, when a case is brought up for appellate review assume an attitude inconsistent with that taken by him at the trial, but that such party is restricted to the theory on which the cause was prosecuted for defendant in the court below."
>
> Railway Co. vs. McCarthy, U. S., 258. (6 Otto, 258.)

This in itself was sufficient to induce the Supreme Court of Ohio to ignore the change of front at that period.

Bullock vs. Kilgour, 49 O. S., 43;
B. & O. Ry. Co. vs. Smith, 54 O. S., 562.

Nobody in the case ever argued that the mere ownership in common of land would attach obligations to such owner for debts incurred, but if there were taxes to pay, or ground rent to pay, or other obligations which threatened the title, and one part owner suggested the borrowing of money to clear off that obligation, and the bank, through its proper representative had assented thereto, nobody could argue that the bank was not liable for its share, not as a partner, but as an owner of an aliquot share of the common property, and that situation was exactly the situation in this case. The bank knew and assented to everything that took place, as found by the Circuit Court in its judgment,

and the Supreme Court decision goes upon the ground that the bank, having a legal right to own these shares had the legal right to protect them, and that is not a federal question because it has been too frequently settled by the Supreme Court, and further that the bank expressly or impliedly authorized every debt that was incurred, and that is not a federal question because it is only the natural result and obligation of a valid contract entered into by the bank within the scope of its powers.

In the second trial after it was remanded by the Supreme Court of Ohio, there was nothing to do but to follow out the decision of the court, and on the second petition in error, the only thing to be considered by the court was whether that had been done or not. In other words, none of the questions which were before the court on the first writ of error can be re-heard or re-examined upon a second.

Johnson vs. Von Kettler, 84 Ill., 315;
Smith et al. vs. Schaffer, 50 Md., 132;
Hernon vs. North Carolina Railroad Co., 127 N. C., 110;
Clark vs. Keith, 106 U. S., 465;
Chaffin vs. Taylor, 116 U. S., 572;
Jameson vs. Maxwell Land Co., 168 U. S., 456;
Bent vs. Miranda, 168 U. S., 471.

The question of whether the bank was liable for any part of the debts was an open question on the first petition in error, but if no attempt was made to classify the debts and differentiate the grounds of liability, until after the original judgment of the state court was pronounced, that fact alone was sufficient, even though the Supreme Court might have been wrong to authorize it to decline to reconsider questions

that might have been made prior to the first decision of all open questions were foreclosed by that decision and if not then open it never became so because no change was ever made in the pleadings.

C. B. MATTHEWS,
Attorney for Defendant in Error.

FILE COPY.

No. 256.

Supreme Court of the United States

OCTOBER TERM, 1906.

THE MERCHANTS NATIONAL BANK OF [illegible],

Plaintiff in Error,

vs.

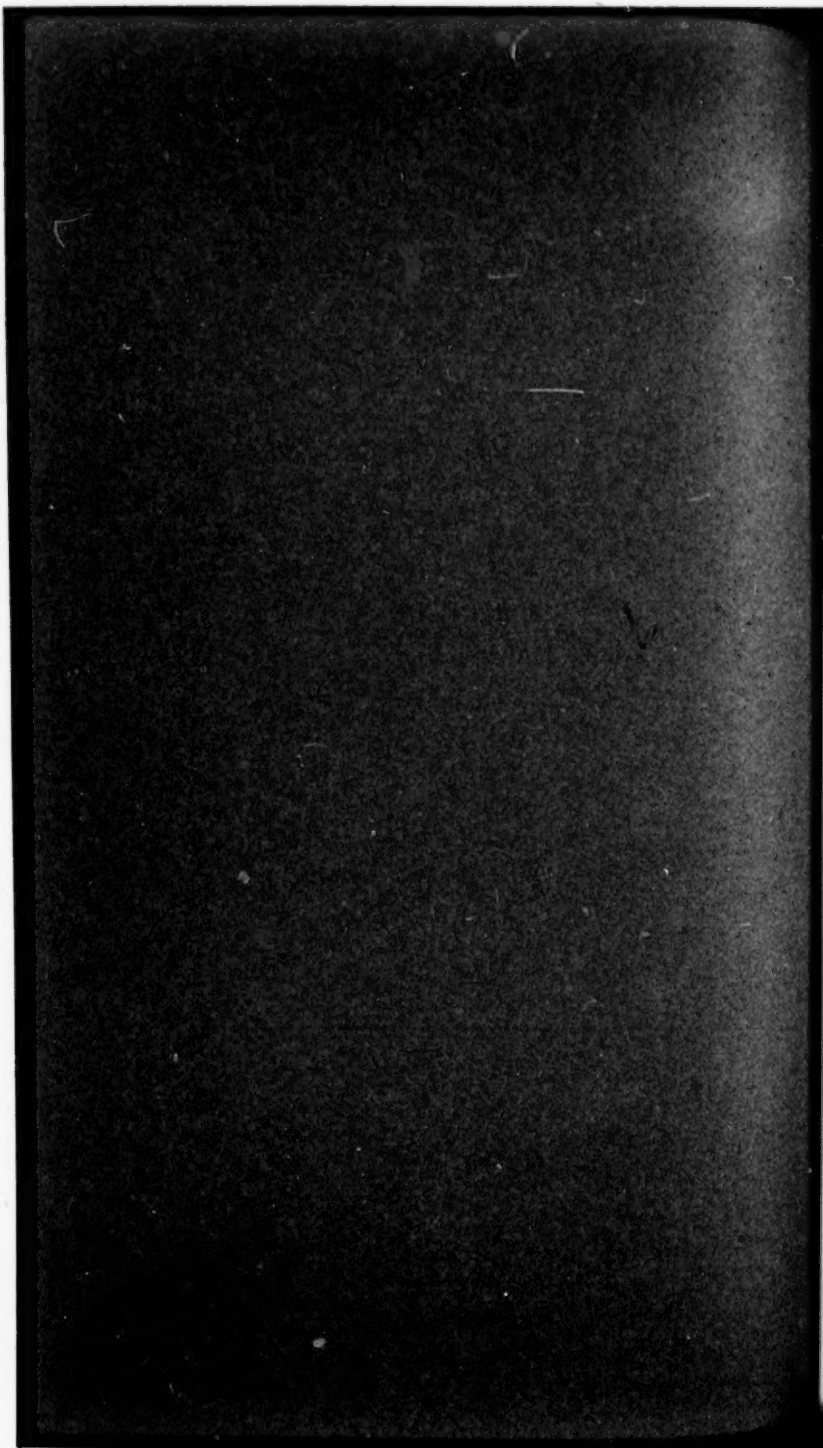
THERESA J. WEHRMANN, Executrix of William F. Wehrmann, Deceased, et al.,

Defendants in Error.

ON ERROR TO THE SUPREME COURT OF [illegible].

Brief for Theresa J. Wehrmann, Executrix.

[illegible]



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

THE MERCHANTS NATIONAL BANK OF CINCINNATI,

Plaintiff in Error,

No. 256. *vs.*

THERSEA J. WEHRMANN, Executrix of William F. Wehrmann, Deceased, et al.

Defendants in Error.

ON ERROR TO THE SUPREME COURT OF OHIO.

Brief for Theresa J. Wehrmann, Executrix.

STATEMENT.

This cause was originally commenced in July, 1897, by William F. Wehrmann, in his life time, in the Court of Common Pleas of Hamilton County, and at his death, his executrix, Theresa J. Wehrmann, one of the defendants, was duly substituted party plaintiff.

The action was brought to wind up the affairs of the Elsmere Syndicate, to provide for the payment of its debts and a complete settlement between the members of the syndicate and its crediters.

The plaintiff in error here was duly made a party thereto and after going through the common pleas and circuit courts it finally reached the Supreme Court of Ohio on the petition of the Merchants National Bank and the judgment of the circuit court was modified and remanded to the circuit court as will appear below:

"69 Ohio State Reports, page 160.

"*The Merchants National Bank* v. *Wehrmann.*

"(No. 8133. Decided October 27, 1903.)

"Error to the Circuit Court of Hamilton County.

"The litigation in this case had its origin in an agreement signed by some twenty-five persons, of which the following is a copy, omitting signatures:

" 'We, the undersigned, in consideration of the mutual agreements herein contained severally agree, as follows:

" 'First. That we will form a syndicate with a capital stock of $320,000, divided into forty shares, of the par value of $8,000 each, and we will take the shares as subscribed by us.

" 'Second. With said capital stock it is agreed to purchase a certain tract of land lying in Section No. 33, Columbia township, Hamilton county, Ohio, as per plat hereunto attached, said tract containing 160 acres, more or less, the purchase price for same to be $300,000, payable $100,000 cash and the balance ($200,000) on ten-year four per cent. ground rent, with privilege of purchase at any time, interest payable quarterly.

" 'Third. The balance of said capital stock, amounting to $20,000, shall be used for the improvement of said land, and for the expenses incident to the management, control and sale thereof.

"'Fourth. The shares of said stock are to be paid for as follows: The sum of $300 per share immediately on signing this agreement; the sum of $2,300 immediately after all shares are taken; the sum of $400 in sixty days after all shares are taken; the balance of $5,000 on each share to be paid out of the proceeds of lots.

"'Fifth. After the cost of land, including the cost of making streets advertising, etc., etc., shall have been paid out of the receipts for the sale of lots, then the receipts will be considered net profits and shall be divided among the shareholders equally, share and share alike.

"'Sixth. Subscriptions to be binding only in case all the forty shares are taken within fifteen days from date hereof. Otherwise, said first payment of $300 on each share to be returned.

"'Cincinnati, Ohio, January 25, 1889.'

"The full number of forty shares was subscribed and certificates of shares in the following form were issued to the subscribers respectively:

"'The Elsmere Syndicate,

"'Investment, $320,000. Paid up $120,000.

"'No. ————. Non-assessable.

"'This is to certify that ———— is the owner of 1-40 interest in the Elsmere Syndicate, transferable in person or by attorney upon the books of the syndicate at its office in the city of Cincinnati, upon the surrender of this certificate.

"'Witness our hands that ——— day of ————.

"'.....,

"'.....,

"'.....,

"'*Trustees.*

"Countersigned,

"'.....,

"'*Secretary and Treasurer.*

"'For value received, ——— sells to ——— the interest above mentioned, and authorizes ———, attorney, to transfer the same on the books of the company.

"'In presence of

"'.....,

"'.....'

"One F. B. McFarlan subscribed for certain shares and purchased others, so that he owned nine shares; and being largely indebted to the Merchants National Bank, he transferred said nine shares to said bank to secure said indebtedness, about the month of January, 1892, which transfer was made to 'W. W. Brown, trustee,' said Brown being cashier of said bank. The bank contends that the transfer to Mr. Brown was as collateral security for the debt; while others claim that the transfer made the bank the owner of the shares.

"The syndicate was organized, by-laws adopted, officers elected, and the powers of the trustees defined, which included the platting of said property, the leasing and selling thereof, to pay the purchase money and ground rents, and to pay the balance of the funds to the holders of said certificates in proportion to the number of shares held by each.

"The syndicate became insolvent in the year 1896 and the persons from whom the land had been obtained foreclosed and purchased the land, and thereby the syndicate was prevented from further carrying on its business.

"After this transfer of the nine shares to Mr. Brown, trustee, the syndicate became largely in-

debted for improvements, ground rent, interest and other items intended for the betterment of the property, and its conversion into money.

"About July, 1897, an action was commenced by William F. Wehrmann against the parties interested in said syndicate, including W. W. Brown, trustee, and the said bank, seeking to hold the owners of said certificate as partners and for an accounting. Issues were made up in which said Brown and said bank denied that they were at any time partners in said syndicate and averring that said nine shares were held as collateral only.

"The case was referred to a master, and he made his report and the case was taken to the circuit court on appeal and there tried upon the report of said master in the common pleas, and exceptions thereto and a finding of facts and conclusions of law separately were made by the circuit court.

"The facts found, going to show the liability of said bank are as follows:

" 'First. That what has been called herein the Elsmere Syndicate was a partnership formed for the purpose of taking the title by lease, with privilege of purchase of certain lands situated near Norwood, this county, owned by George W. B. Cleneay and Joseph S. Cleneay, which was under lease to one John Woltz, who quit-claimed his title to Myron A. Spencer, Frank B. McFarlan and James McArdle, as trustees for said syndicate, on or about the 16th day of February, 1889. And that the business of the said syndicate was to subdivide said lands into lots, lay out and improve streets, and sell said lots for the profit of the members of the syndicate.

" 'Second. That the interest of the parties in

said partnership are represented by certificates of equal interest or shares, forty in number, numbered consecutvely from one to forty and transferable from hand to hand on the books of the said company.

" 'That the partnership became insolvent, and it became impossible to carry on further the said business and said partnership was deprived of what remained of said leasehold premises by foreclosure and sale of same and that it became necessary to file the petition in the court below to wind up the affairs and business of the said partnership, to realize the assets, if any, and to compel the partners to liquidate the indebtedness thereof.

" 'Fourth. That on June 15, 1896, the interests in said partnership were held by the following named persons in the proportion set opposite their names, to-wit:

" 'Myron A. Spencer, two shares.

" 'Wm. F. Wehrmann, estate, Theresa J. Wehrmann, executrix, five shares.

" 'Merchants National Bank of Cincinnati, Ohio, nine shares.

" 'James Armstrong's estate, James C. Armstrong, Floris A. Sackett and Isaac B. Matson, executors, three shares.

" 'Moses Krohn, one share.

" 'Leopold Feiss, one share.

" 'Benjamin Pritz, one share.

" 'Peter G. Thompson, one share.

" 'Joseph Taylor, one share.

" 'Richard Hempel, three shares.

" 'William Bell, eight shares.

" 'W. B. Kennedy, two shares.

" 'J. Fred Woltz, one share.

" 'James McArdle's estate, Margaret McArdle, administratrix, one share.

" 'Peter J. Dunn's estate, Ella C. Donnell, executrix, one share.

" 'Being forty in all. That the above named William Bell and W. B. Kennedy are residents of Canada and have not and could not have been served with process herein, and are not subject to the jurisdiction of the court. That the shares standing in the name of Richard Hempel were not his property, and he is not liable thereon but one of said shares was conveyed to him by John Brokamp, party hereto, and one of the original subscribers to said syndicate, who is liable thereon. That the share standing in the name of Adam T. Voll, No. 39, was one of the five shares belonging to William F. Wehrmann, and that said Wehrmann was the owner thereof and that his estate is liable for all assessments thereon, including the amount already paid up by Adam T. Voll, as hereinafter mentioned. That Myron A. Spencer and J. Fred Woltz above named and Peter J. Dunn's estate are insolvent and nothing can be made from them. That the other named, including John Brokamp, are liable for the debts of the said partnership and the costs of this case, in proportion to the number of shares held by each respectively, but the right to contribution against said Myron A. Spencer and J. Fred Woltz and Peter J. Dunn's estate in favor of the other partners is preserved. That the shares standing in the name of W. W. Brown, trustee, are the shares of the Merchants National Bank, originally held by it as collateral, were surrendered, and the said shares were entered on the books of the bank as owned by the bank and so reported to the United States Govern-

ment, and the bank through its vice-president, took part in the management of the said syndicate and in the effort to preserve its property from sacrifice and loss and all this was done with the knowledge and acquiesence of the board of directors of said bank.'

"The court found the indebtedness to different persons in detail and then found that there are only twenty-three solvent share holders and charges them including said bank with the payment of the whole indebtedness and adjudges that in case of the subsequent insolvency of any of said shareholders before payment that the deficiency thus caused shall be made up by the remaining solvent shareholders. The decree against the bank is for over $17,000. The plaintiff having died, his executrix carried on the litigation.

"A motion for a new trial was overruled and bill of exceptions taken by the bank. Proper and full exceptions were saved throughout.

"A petition in error was filed in this court by the bank seeking to reverse the judgment of the circuit court.

"BURKET, C. J.

"The Merchants National Bank, of Cincinnati, is a corporation organized under the national banking laws of the United States, and the Elsmere Syndicate was a partnership consisting of forty shares, each partner holding one or more shares, and each share evidenced by a certificate as shown in the foregoing statement of facts, and which certificates were transferable on the books of the syndicate and such transfers were intended to make the transferee a partner in the syndicate instead of the transferor, without a dissolution of the partnership.

"The circuit court finds that the bank became owner by transfer of nine shares of this syndicate or partnership which shares were taken by the bank to secure the payment of a large indebtedness owing to said bank for loans by it made to one of its customers in the usual course of business.

"The bank in accepting said transfer evidently regarded it as a collateral but it so treated the shares and so transacted the business as to said shares that the circuit court found that the bank became the owner of the shares and there was evidence warranting such finding. The case must, therefore, be determined upon the theory that the bank held the shares as owner and not merely as collateral; the purpose of such ownership, however, being to secure the ultimate payment of said indebtedness out of the proceeds of said shares, and to that end it was necessary that the property of said syndicate should be put into such condition as to yield the most money and this is what the trustees of the syndicate attempted to do; and in so doing debts were incurred, which the syndicate was unable to pay, and after all its property had been consumed in paying said debts a large debt still remained.

"The restrictions contained in our banking laws are for the purpose of securing the solvency and stability of the banks and the statutes should be so construed and the law administered as to reasonably bring about that end. The wealth and prosperity of the people depend to a large extent upon the soundness of the banks and the safety of the currency. The purpose of the government is to foster and encourage sound banking and preserve a safe currency; and it therefore allows national banks to collect claims due

them, even though a statute or a rule of law or equity may have been infringed in the incurring of the debt. The punishment for such infringement must come from the federal authorities in a proceeding instituted for that purpose, and not by a denial of the courts of the right of collection as a punishment.

"It is largely for the purpose of maintaining the solvency of banks that a national bank is allowed to collect loans secured by mortgage in violation of Section 5137, U. S. Revised Statutes; *National Bank* v. *Matthews*, 98 U. S., 621; *National Bank* v. *Whitney*, 103 U. S., 99.

"It is to the same end that the solvent shareholders in a national bank can not be compelled to stand good for the individual liability of the insolvent ones, and that the loss caused by such insolvency must be borne by the creditors of the bank. *U. S.* v. *Knox*, 102 U. S., 422; Section 5151, U. S. Revised Statutes.

"Hence it is that while banks are hedged about with restrictive laws as to making loans and discounts so as to incur no bad debts, the most liberal provisions are made for securing debts already incurred, by the taking of such collateral as may seem best in the judgment of the officers of the bank. Such collateral may become the property of the bank, in course of enforcing the security. And while a national bank can not lawfully purchase and hold shares in a corporation as an investment, *California Bank* v. *Kennedy*, 167 U. S., 362, it may accept the stock of a corporation as collateral security for a loan and may thereafter in realizing upon the collateral, become the owner thereof, and liable for individual liability the same as any other stockholder (*National Bank* v. *Case*, 99 U. S., 628).

This case seems to have been overruled in *Scott* v. *Deweese*, 181 U. S., 217, where the court say at the close of the opinion:

"'Whether a national bank may not be deemed a shareholder within the meaning of Section 5151, if it holds shares of another bank as security for previous indebtedness, is a question suggested in former cases, but not decided and upon which in this case, no opinion need be expressed.'

"But conceding that a national bank may take shares in another bank as collateral security for a new loan or to secure the payment of an old one and that it may become the owner of such shares in attempting to realize on such collateral and that it may thereafter be liable to creditors on its individual liability as such shareholder yet that falls far short of holding a national bank liable as a partner in a partnership, and liable as such partner for, not only its own share of the debts of the firm but also the debts of its co-partners. The individual liability of a holder of shares in a national bank is in its nature several and not joint (*U. S.* v. *Knox*, 102 U. S., 422); while the liability of a partner for partnership debts is as to creditors usually held to be joint, but some cases hold it to be joint and several.

"The individual liability is an inseparable incident to national bank shares, for which the lawful holder is liable, but this liability is his own debt and attaches to specific several articles of his property—the share of stock—and is, therefore, limited and can not exceed the face value of the stock. But in the case of shares in a partnership, the liability of a partner is not for a specific amount adhering to his share as an incident and limited to a certain amount, but the

only limitation is the whole indebtedness of the firm and which in many cases would far exceed the entire resources of the bank, and drive it into insolvency. The purpose of allowing a national bank to take collateral security is to enhance its solvency, and not to permit it to enter wild speculations as a partner under the pretext of enforcing its rights as a pledgee or owner.

"'It is settled that the United States Statutes relative to national banks constitute the measure of the authority of such corporations, and that they can not rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established. *Logan County Bank* v. *Townsend*, 139 U. S., 67, 73; *California Bank* v. *Kennedy*, 167 U. S., 362, 366.'

"To become a member of a partnership in any manner or for any purpose, is not incidental to carrying on the business for which national banks are established and is certainly not expressly granted. The power, therefore, does not exist. The liabilities for which a national bank must respond, are such only as are created or incurred by its officers, acting in the capacity of officers of the bank alone, and not in connection with other trustees or officers of other companies. Were it otherwise the other trustees or officers, might outnumber the officers of the bank, and impose burdens on the bank which would ruin it; and thus the bank would be controlled not by its officers, but, by outsiders. The officers of a bank can not delegate their power to others. It is, therefore, clear that a national bank can not be a partner in a co-partnership, and can not incur a partnership liability.

"The same has been held as to corporations in this state (*Gearinck* v. *Alcott*, 66 Ohio St., 94). The first subdivision of the syllabus was omitted by mistake of printer, but is found in the head note and also in the index and is as follows: 'A corporation can not be a member of a partnership.'

"But it is contended that while a national bank can not become a partner generally that where it becomes the owner of a share in an existing partnership, like this Elsmere Syndicate, that in effect it becomes a partner and liable as such. That begs the question. If it had the power to become a partner, such might be the case; but not having the power, it can not go beyond its powers and can not by any act make itself a partner and can not incur a partnership liability.

"Cases are cited in which a bank has taken some specific piece of property, as a ship for instance, to secure a debt, and had been held liable for the expenses of managing or converting such property, but such expenses were incurred by the bank and were its individual debt and not the debt of a partnership. With such cases we fully agree, but in those cases it does not appear that the bank was hampered by a lack of power, as is the case under our national banking act. *Royal Bank of India's Case*, L. R., 4 Ch. App. Cas., 252.

"Not having the power to enter into such partnership it is well settled that the bank may plead such want of power to defeat an attempt to hold it as such partner. *California Bank* v. *Kennedy*, 167 U. S., 362.

"It is further agreed that the bank partly realized on some of these shares and held itself

out as a partner, and it is therefore estopped from now claiming that it was not such partner.

"That the realizing on stock by receiving dividends does not create an estoppel, was held in the above cited case of *Scott* v. *Deweese*, 181 U. S., 217; the court near the close of the opinion hold:

"'Of the powers of a national bank under the statutes providing for their creation, every one must take notice.'

"Every one is, therefore, chargeable with knowledge that a national bank can not be a partner and, therefore, this bank could not hold itself out as being that, which in law it could not be and its acts in that behalf could deceive no one, as no one could in law rely upon such acts. One can not rely upon a representation which he knows to be false or impossible.

"The bank having become the owner of these nine shares and not having the power to become a partner, it became in legal effect a part owner of the property of the syndicate, which ownership was in its nature several, and the bank, through its trustee, having managed this several interest in connection with the trustees of the other shares as to their interests, the bank became and is liable for its said share of the expenses of purchasing, managing, handling, holding, improving and disposing of the property. The bank is thus liable for nine-fortieth parts of the debts and expenses remaining after applying the proceeds of the property upon the indebtedness.

"The record does not clearly furnish the data from which this amount can be ascertained by this court and therefore the judgment against the plaintiff in error will be reversed and the cause remanded to the circuit court with instructions

to ascertain what nine-fortieths parts of said debts and expenses amount to and render judgment against said bank for that sum, and also for nine-fortieths parts of the costs.

"Judgment reversed and cause remanded.

"SPEAR, DAVIS, SHAUCK and PRICE, JJ., concur."

The circuit court having complied with the mandate of the Ohio Supreme Court as expressed therein, the Merchants National Bank, the plaintiff in error here, then prosecuted error to the Supreme Court of Ohio and also from that court to this court.

ARGUMENT.

We contend there is no federal question involved in this proceeding and that, therefore, the petition in error should be dismissed and remanded to the state court. Plaintiff in error alleges three assignments of error, but they are all embraced in the single question: Was the action of the Supreme Court of Ohio in violation of Sections 5136 and 5137 of the Revised Statutes of the United States? This question is to be determined only on the original pleadings and the judgments of the respective state courts. And all the evidence in the printed record from pages 20 to 37, inclusive, and Exhibits on pages 49 to 57 are wholly irrelevant, immaterial and should and ought to be expunged from the record.

Wehrmann, the plaintiff in the original petition in the court of common pleas (page 18 of the Record), averred insolvency of the syndicate and the shareholders of the syndicate were liable as partners and that at the time of contracting the debts of the syndicate, the Merchants

National Bank was the owner of nine shares of the total forty shares, which nine shares it had acquired before the insolvency of the syndicate from one McFarlan to secure and in payment of a debt owing the bank by McFarlan.

The answer of the bank denied that any time it became the owner of any shares in the syndicate either by purchase or as a security for the debt of any person, no finding of the original court of common pleas is in the record, but the finding and judgment of the circuit court appears on page 37 of the record, who tried the case on appeal, was in substance that the syndicate was a partnership and its members liable as such and the Merchants National Bank liable for nine-fortieths of the indebtedness. This judgment the Supreme Court of Ohio reviewed and sustained the contention of the bank that it could not be held as a partner, but having acquired the shares of one of the members to secure and in payment of a debt, the bank thereby became the owner of an undivided nine-fortieths parts of the assets of the syndicate, and having participated in creating the debts of the syndicate to realize on its security it was, therefore, liable for nine-fortieths of the syndicate debts, and remanded the cause to the Circuit Court of Hamilton County, Ohio, with instructions to "proceed and ascertain the amount of debts and expenses of said Elsmere Syndicate" remaining unpaid after the application of the assets of said syndicate to the payment of its debts, including interest, and then render judgment against said plaintiff in error for nine-fortieths parts of said debts and interest remaining so unpaid and also render judgment against said plaintiff in error for nine-fortieths part of the costs (see judgment Supreme Court Record, page 48). The opinion upon which

this judgment is based, plaintiff in error for some unexplained reason failed to incorporate in the record at bar, but is found in 69 Ohio State Reports, page 160, a copy of which he have incorporated in this brief.

The circuit court carried out the instructions of the Ohio Supreme Court, as appears on pages 57 to 63 of the Record, and its judgment was affirmed by the Ohio Supreme Court, without report, as appears by the latter's journal entry, page 70 of the Record. If there ever was a federal question involved in the case, the Supreme Court on plaintiff in error's petition eliminated it from the record and held in express terms that a national bank could not be a member of a partnership and, therefore, not liable as such, but having become the owner of the nine-fortieths of the real estate and personalty of the syndicate through its debtor, McFarlan, and afterwards, in order to realize its debt, created an indebtedness in connection with its co-tenants, in managing, handling, holding, improving and disposing of the property it had thus acquired, it was liable for its proportion of that indebtedness it had created. For the Supreme Court of Ohio to have held otherwise would be to have said that a national bank was not liable in the state courts for its ordinary contract debts, because we contend that such an indebtedness is not prohibited by any federal statute.

Wehrmann's original petition (Record, page 16) set out the facts but characterized all the members as partners (including the bank), but the object of the action was the equitable winding up of the syndicate, to convert its assets into money and pay its debts.

As to the creditors it was immaterial whether the members were owners as partners, tenants in common or other-

wise. So whatever the character of the ownership of the respective members, they could not escape liability of their own creation. All the material allegations of Wehrmann's original petition were sustained by the Supreme Court save and except that the bank was an undivided owner in severalty and liable for nine-fortieths of the debts they had created and participated in creating instead of being liable as a partner for nine-twenty-thirds. And we undertake to say that this court will not concern itself as to the amount of the indebtedness or whether the indebtedness was created before or after the bank acquired its ownership through its debtor, McFarlan. All these questions are settled by the Supreme Court of Ohio and the only question here, is such finding in violation of the United States Banking Act as expressed in R. S., 5136 and 5137, and indicated in the entry of certification, page 71 of the Record?

We concede that if the bank had acquired the ownership in the syndicate property otherwise than by taking it in payment of or as security for a previously contracted valid indebtedness, the transaction would have been *ultra vires* and void and could not be confirmed or ratified.

Earl v. *Carson*, 188 U. S., p. 52.

But we do not contend that if the bank, in order to secure and in payment of a valid debt due it, acquired ownership either of personal or real property, creates an indebedness in handling or putting the same in saleable condition or in placing it on the market to realize its original debt, it is not an *ultra vires* act, that it can escape liability for its own acts. And an action can be main-

tained in the state courts to recover such indebtedness under the act of August 13, 1888. The principle is not new or novel.

Roebling v. *First National Bank of Richmond*, 30 Fed. Rep., page 744.
Cockrill v. *Abeles*, 86 Fed. Rep., 505.
Cooper v. *Hill*, 94 Fed. Rep., 94.
Libby v. *Union Nat. Bank*, 99 Ill., 622.
Upton v. *South Reading National Bank*, 120 Mass., 153.
Reynolds v. *Crawfordsville First National Bank*, 112 U. S., 405.
First National Bank v. *Exchange Bank*, 92 U. S., 122.

A very wide latitude is given to a bank to take property to prevent the loss of a debt and to use and improve it temporarily until an advantageous disposition can be made of it (5 Cyc. L. & P., p. 591).

Judge Sanborn in the Cockrill case, 86 Fed. Rep., 505, states the principle clearly that—

> "It will be admitted, of course, that a national bank has no power to purchase real estate except such as is necessary for the convenient transaction of its business or such as it may be compelled to take as security for or in satisfaction of debts previously contracted (Rev. St., 5137). We think, however, that when a national bank, as in the present case, has lawfully acquired an undivided interest in real property in satisfaction of a debt, it may lawfully purchase other undivided interests in the property and discharge liens or encumbrances thereon providing such action is necessary to enable it to manage or dispose of the property to better advantage.

> "The power conferred by the statute to acquire real estate in satisfaction of a debt is not exhausted by acquiring simply an undivided interest in such property, but it extends to the acquisition of all interests in the property, if an undivided control and ownership thereof is deemed necessary for the ultimate security of the bank.
>
> "In many cases the right accorded to national banks to take real estate for debts previously contracted would prove a barren right if they were limited to such an interest as was first acquired and were denied the right to purchase other outstanding titles and interests."

In the case at bar the Merchants National Bank lawfully acquired its undivided interest in the syndicate property and the presumption necessarily attached what the bank did in creating the indebtedness which it did, that it was done in a prudent manner and was necessary to properly put the property thus acquired on the market in a saleable condition to realize on their original loan to McFarlan.

If as was stated in the Roebling case the bank had the lawful right to lend its money to McFarlan as authorized by its charter, this carried with it the power to collect and as an incident to such power the right to secure and save the debt. And we contend that when it affirmatively appears in the record that the Merchants Bank loaned the money to McFarlan in due course that they acquired an undivided ownership in the syndicate property to save and collect the debt, the manner, means and method they adopted are presumed to be in accordance with their authority to collect and are not required to

appear affirmatively in the record in order to sustain a judgment for an indebtedness contracted to carry out the purpose to realize on the security to pay the original debt.

The original pleadings show that at the time of the acquisition of McFarlan interests to secure its debt the syndicate was the owner of the real estate or leasehold; that it purchased none thereafter and that *at the time of making said loans and contracting said debts* the Merchants National Bank was the owner of nine-fortieths of its property; that the loans made were necessary to save the shareholders from loss. The claim of Wehrmann was that at the time the Merchants Bank acquired its interest in the syndicate the indebtedness was created in preserving and putting the property it then owned in a marketable condition and in disposing of it. There is no averment in either the petition or the bank's answer that at the time, or thereafter, there was any buying or speculation in real estate. They were at that time doing their utmost to realize on their holdings.

And this was the finding of the Circuit and Supreme Courts. Whether what the syndicate members and the bank did in order to realize on their holdings was done in a prudent manner or whether they were mistaken in their judgment, or acted wisely or otherwise in creating the indebtedness to thus realize on their property is a matter we do not think this court is called upon to consider. Therefore, the Converse case cited by plaintiff in error, it seems, can not apply to the case at bar.

In conclusion, we contend that when the Supreme Court on the petition of the plaintiff in error held that the bank could not be held liable as a partner, but was liable as an owner in severalty, it eliminated any federal question

from the case as far as the plaintiff in error is concerned, and there being no federal question involved in the judgment appealed from, this case should be dismissed and remanded to the Ohio Supreme Court.

Respectfully submitted,

RALSTON & SIDDONS and

JOSEPH B. KELLEY,

Counsel for Theresa J. Wehrmann, Executrix.

FILE COPY.

No. 256.

Supreme Court of the United States

Office Supreme Court U. S.
FILED
APR 7 1906

THE MERCHANTS NATIONAL BANK OF CINCINNATI,
Plaintiff in Error,

versus

THERESA J. WEHRMANN, Executrix, et al,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF OHIO.

Brief for Defendant in Error, Floris A. Sackett, Executrix, etc.

WILLIAM J. SHRODER,
Of Counsel for Floris A. Sackett, Executrix.

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SUPREME COURT OF THE UNITED STATES.

THE MERCHANTS NATIONAL BANK OF CINCINNATI,

Plaintiff in Error,

No. 256. *vs.*

THERESA J. WEHRMANN, Executrix, et al,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF OHIO.

Brief for Defendant in Error, Floris A. Sackett, Executrix, etc.

STATEMENT OF THE CASE.

This cause is in this court by writ of error to the Supreme Court of Ohio. It was twice before the latter court, the second hearing being to review the judgment which was entered by the lower court upon a remand to it by the Supreme Court to ascertain additional facts and to enter judgment thereon (see Record, p. 48). The facts upon which the Supreme Court of Ohio made its first decision are found in its report of the case in 69 O. S., pp. 161 *et*

seq. in which is copied on p. 164 the finding of the lower court as printed on p. 37 of the record here (*infra* p. 6). The additional facts on which it made the supplemental decision are found in the printed record, pp. 57, 62. These constitute all the facts that were before that court and, therefore, constitute all the facts before this court.

Finley v. *Whiteley*, 46 O. S., 524-527, bottom.
Building & Loan Assn. v. *Ebaugh*, 185 U. S., 114, 121.
Egan v. *Hart*, 165 U. S., 188.
W. U. Tel. Co. v. *Call. Pub. Co.*, 181 U. S., 92, 103.
Bement v. *Nat. Harrow Co.*, 186 U. S., 70, 83.

The state courts having found all the facts, this finding is conclusive on this court; it will not re-examine the evidence but will take the facts as found in the court below. It follows that it was unnecessary and useless to print the partial evidence in the record, pp. 20 to 37, pp. 53 to 57, Exhibits 56, 58, 63 and 74 (pp. 48 to 52), since this court will not go into the examination of it.

THE FACTS.

In *The Merchants National Bank* v. *Wehrmann*, 69 O. S., 161 to 167, inclusive, the Supreme Court of Ohio found:

> "The litigation in this case had its origin in an agreement signed by some twenty-five persons, of which the following is a copy, omitting signatures:
>
> "We, the undersigned, in consideration of the mutual agreement herein contained, severally agree, as follows:
>
> "First. That we form a syndicate with a capital stock of $320,000, divided into forty shares,

of the par value of $8,000 each, and we will take the shares as subscribed by us.

"Second. With said capital stock it is agreed to purchase a certain tract of land lying in Section No. 33, Columbia township, Hamilton county, Ohio, as per plat hereunto attached, said tract containing 160 acres, more or less, the purchase price for same to be $300,000, payable $100,000 cash, and the balance ($200,000) on ten-year four per cent. ground rent, with privilege of purchase at any time, interest payable quarterly.

"Third. The balance of said capital stock, amounting to $20,000, shall be used for the improvement and development of said land, and for the expenses incidental to the management, control and sale thereof.

"Fourth. The shares of said stock are to be paid for as follows: The sum of $300 per share immediately on signing this agreement; the sum of $2,300 immediately after all shares are taken; the sum of $400 in sixty days after all shares are taken; the balance of $5,000 on each share to be paid out of the proceeds of lots.

"Fifth. After the cost of land, including the cost of making streets, advertising, etc., etc., shall have been paid out of the receipts for the sale of lots, then the receipts will be considered net profits, and shall be divided among the shareholders equally, share and share alike.

"Sixth. Subscriptions to be binding only in case all the forty shares are taken within fifteen days from date thereof. Otherwise said first payment of $300 on each share to be returned.

"Cincinnati, Ohio, January 25, 1889."

The full number of forty shares was subscribed, and certificates of shares in the following form were issued to the subscribers, respectively:

"The Elsmere Syndicate.

"Investment, $320,000. Paid up, $120,000.

"No. Non-assessable.

"This is to certify that ..... is the owner of a 1-40 interest in The Elsmere Syndicate. Tranferable in person or by attorney upon the books of the syndicate at its office in the city of Cincinnati, upon the surrender of this certificate.

"Witness our hands this ..... day of .....

".....

".....

"....."

"Trustees.

"Countersigned,

"....."

"Secretary and Treasurer.

"For value received, ... sells to ..... the interest above mentioned, and authorizes ....., attorney to transfer the same on the books of the company.

"In the presence of

".....

"....."

One F. B. McFarland subscribed for certain shares and purchased others, so that he owned nine shares; and being largely indebted to the Merchants National Bank, he transferred said nine shares to said bank to secure said indebtedness, about the month of January, 1892, which transfer was made to "W. W. Brown, trustee," said Brown

being cashier of said bank. The bank contends that the transfer to Mr. Brown was as collateral security for the debt; while others claim that the transfer made the bank the owner of the shares.

The syndicate was organized, by-laws adopted, officers elected, and the powers of the trustees defined, which included the platting of said property, the leasing and selling thereof, to pay the purchase money and ground rents, and to pay the balance of the funds to the holders of said certificates in proportion to the number of shares held by each.

The syndicate became insolvent in the year 1896, and the persons from whom the land had been obtained foreclosed, and purchased the land, and thereby the syndicate was prevented from further carrying on its business.

After this transfer of the nine shares to Mr. Brown, trustee, the syndicate became largely indebted for improvements, ground rent, interest, and other items intended for the betterment of the property, and its conversion into money.

About July, 1897, an action was commenced by William F. Wehrmann against the parties interested in said syndicate, including W. W. Brown, trustee, and the said bank, seeking to hold the owners of said certificates as partners, and for an accounting. Issues were made up in which said Brown and the said bank denied that they were at any time partners in said syndicate, and averring that said nine shares were held as collateral only.

The case was referred to a master, and he made his report, and the case was taken to the circuit court on appeal, and there tried upon the report of said master in the common pleas, and exceptions thereto, and a finding of

facts and conclusions of law, separately, were made by the circuit court.

The facts found, going to show the liability of said bank, are as follows (being the same finding of facts in Record, pp. 37, 38):

> "First. That what has been called the Elsmere Syndicate was a partnership formed for the purpose of taking the title by lease, with privilege of purchase, of certain lands situated near Norwood, in this county, owned by George W. B. Cleneay and Joseph S. Cleneay, which was under lease to one John Woltz, who quit-claimed his title to Myron A. Spencer, Frank B. McFarlan and James McArdle, Jr., as trustees for said syndicate, on or about the sixteenth day of February, 1889. And that the business of the said syndicate was to subdivide said land into lots, lay out and improve streets, and sell said lots for the profit of the members of the syndicate.
>
> "Second. That the interests of the partners in said partnership were represented by certificates of equal interest of shares, forty in number, numbered consecutively from one to forty and transferable from hand to hand on the books of the said company.
>
> "Third. That the partnership became insolvent, and it became impossible to carry on further the said business, and said partnership was deprived of what remained of said leasehold premises by foreclosure and sale of same, and that it became necessary to file the petition in the court below to wind up the affairs and business of the said partnership, to realize the assets, if any, and to compel the partners to liquidate the indebtedness thereof.

"Fourth. That on June 15, 1896, the interests in said partnership were held by the following named persons, in the proportion set opposite their names, to-wit:

"Myron A. Spencer, two shares.

"Wm. F. Wehrmann estate, Thersea J. Wehrmann, executrix, five shares.

"Merchants National Bank of Cincinnati, Ohio, nine shares.

"James Armstrong's estate, James C. Armstrong, Floris A. Sackett and Isaac B. Matson, executors, three shares.

"Moses Krohn, one share.

"Leopold Feiss, one share.

"Benjamin Pritz, one share.

"Peter G. Thompson, one share.

"Joseph Taylor, one share.

"Richard Hempel, three shares.

"William Bell, eight shares.

"W. B. Kennedy, two shares.

"J. Fred Woltz, one share.

"James McArdle's estate, Margaret McArdle, administratrix, one share.

"Peter J. Dunn's estate, Ella C. Donnell, executrix, one share.

"Being forty in all. That the above named William Bell and W. B. Kennedy are residents of Canada and have not and could not have been served with process herein, and are not subject to the jurisdiction of the court. That the shares standing in the name of Richard Hempel were not his property, and he is not liable thereon, but one of said shares was conveyed to him by John Brokamp, party hereto, and one of the original subscribers to said syndicate, who is liable thereon. That the share standing in the name of Adam T. Voll, No. 39, was one of the five shares

belonging to William F. Wehrmann, and that said Wehrmann was the owner thereof, and that his estate is liable for all assessments thereon, including the amount already paid up by Adam T. Voll, as hereinafter mentioned. That Myron A. Spencer and J. Fred Woltz, above named, and Peter J. Dunn's estate are insolvent and nothing can be made from them. That the others named, including John Brokamp, are liable for the debts of the said partnership and the costs of this case, in proportion to the number of shares held by each, respectively, but the right to contribution against said Myron A. Spencer and J. Fred Woltz and Peter J. Dunn's estate in favor of the other partners is preserved. That the shares standing in the name of W. W. Brown, trustee, are the shares of the Merchants National Bank, orignally held by it as collateral, but transferred to it as owner when they were transferred to said Brown; that when so transferred the notes for which they had been held as collateral were surrendered, and the said shares were entered on the books of the bank as owned by the bank, and so reported to the United States government, and the bank, through its vice-president, took part in the management of the said syndicate and in the effort to preserve its property from sacrifice and loss, and all this was done with the knowledge and acquiescence of the board of directors of said bank."

Upon these facts the Supreme Court of Ohio held as follows (69 O. S., 169, 170):

"The Merchants National Bank of Cincinnati, is a corporation organized under the national banking laws of the United States, and the Els-

mere Syndicate was a partnership consisting of forty shares, each partner holding one or more shares, and each share evidenced by a certificate as shown in the foregoing statement of facts, and which certificates were transferable on the books of the syndicate, and such transfers were intended to make the transferee a partner in the syndicate instead of the transferor, without a dissolution of the partnership.

"The circuit court finds that the bank became owner by transfer of nine shares of this syndicate or partnership, which shares were taken by the bank to secure the payment of a large indebtedness owing to said bank for loans by it made to one of its customers in the usual course of business.

"The bank in accepting said transfer evidently regarded it as a collateral, but it so treated the shares and so transacted the business as to said shares, that the circuit court found that the bank became the owner of the shares, and there was evidence warranting such finding. The case must, therefore, be determined upon the theory that the bank held the shares as owner and not merely as collateral; the purpose of such ownership, however, being to secure the ultimate payment of said indebtedness out of the proceeds of said shares, and to that end it was necessary that the property of said syndicate should be put into such condition as to yield the most money, and this is what the trustees of the syndicate attempted to do; and in so doing debts were incurred, which the syndicate was unable to pay, and after all its property had been consumed in paying said debts, a large debt still remained."

For its conclusion of law the court held (69 O. S., 175):

> "The bank having become the owner of these nine shares, and not having the power to become a partner, it became in legal effect a part owner of the property of the syndicate, which ownership was in its nature several, and the bank, through its trustee, having managed this several interest in connection with the trustees of the other shares as to their interests, the bank became and is liable for its said share of the expenses of purchasing, managing, handling, holding, improving, and disposing of the property. The bank is thus liable for nine-fortieths parts of the debts and expenses remaining after applying the proceeds of the property upon the indebtedness."

The judgment of the Supreme Court of Ohio entered October 27, 1903 (Record, p. 48), was as follows:

> "This cause came on to be heard upon the transcript of the record of the Circuit Court of Hamilton County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same hereby is, reversed; and this cause is remanded to the Circuit Court of Hamilton county, with the instruction to proceed and ascertain the amount of debts and expenses of said Elsmere Syndicate remaining unpaid after the application of the assets of said syndicate to the payment of its debts, including interest, and then render judgment against said plaintiff in error for nine-fortieth parts of said debts and interest remaining so unpaid, and also render judgment against said plaintiff in error for nine-fortieth parts of the costs."

Upon this judgment and mandate sent down to it, the lower (circuit) court entered the decree of June 19, 1904, (pages 57 to 62, inclusive, of the record). This decree made a finding of the debts and liabilities (Record, p. 61) of the Elsmere Syndicate but did not find that any of them were incurred prior to January 15, 1892—it found that nine-fortieths of the said debts and interest remaining unpaid after applying the assets amounted to $9,176.13, for which with interest from December 15, 1901, it entered judgment against the bank.

(Note erratum in Record, p. 41, 15th line, "1890" ought to be "1900.")

This judgment of the circuit court was on February 3d, 1905, affirmed by the Supreme Court of Ohio upon the findings of facts made by the lower court (Record, p. 70).

ON THE QUESTION OF JURISDICTION OF THIS COURT.

Has this court jurisdiction? What title, right, privilege or immunity was specially claimed under a statute of the United States and denied? The record discloses that the action, as commenced in the court of common pleas (Record, pp. 16, 19), was for the winding up of a syndicate partnership, an accounting between its members, and for "such other and further relief as the plaintiff may be in equity entitled to." The bank's answer (Record, p. 19) did *not* claim any federal immunity. From the judgment of the court of the first instance, an appeal to the circuit court was taken by the bank and upon the trial *de novo* (the parties allowing the trial there to be had on same pleadings), the answer contained the same allegations al-

though amendable in that court. The findings and judgment of the court are on pp. 37 *et seq.*, Record (*supra*, p. 6). The first protest against the power of the bank as a corporation under the "banking laws of the United States" appears in the motion for a new trial (Record, pp. 45, 46) where as the fourth ground it is inferentially and generally claimed that there was error in the decision because it was "to the effect that such a corporation has power to be or *become a member of a partnership.*" Thus far there was in the lower courts no *special* claim of immunity under any *statute* of the United States. The petition in error filed in the Supreme Court on September 2, 1902 (Record, pp. 46, 47), in its assignment of errors repeats this objection in the same general form and fails to make any special claim under any statute of the United States. However, the Supreme Court, as already stated in this brief (p. 10, *supra*), did not deny this contention. It decided that the bank had not the power of being a partner or becoming liable as such, but it was a part owner with the syndicate of the property and was in law proportionately liable for the expenses of "purchasing, managing, handling, holding, improving and disposing of the property." At this 1903 hearing of the Supreme Court was the time and occasion for the bank to make its special claim of non-liability by reason of its ownership in severalty; for the opinion (69 O. S., 161) and judgment of the Supreme Court (Record, p. 48) make it conclusive that it considered as before it on the record the very question of the bank's ownership in severalty and its liability by reason thereof. And no party to this action has a right to deny the presumption of hav-

ing considered the record in the same light. This decision *on the construction of the record* did not call upon the court to pass on any federal question; it was wholly independent of such question. And the record shows no special claim of federal immunity declared on this ground; not even by motion for a rehearing. The Supreme Court (Record, p. 48) remanded the cause to the circuit court with special instruction restricting the jurisdiction of the latter court to the ascertainment of specific facts and the rendition of a certain character of judgment. Upon the mandate sent down the circuit court necessarily upon the *same pleadings* ascertained the specific facts and entered the judgment directed (Record, pp. 63, *et seq.*) The only federal claim there set up by the bank was the *general* one (Record, p. 63), the fourth ground in its motion for a new trial that the bank as a corporation under the "banking laws of the United States" could not "under the provisions of said laws be held liable for any proportion of the debts and liabilities of the partnership known as the Elsmere Syndicate." Now inasmuch as this had been passed upon by the Supreme Court and the circuit court had no power to step beyond the directions of the mandate of the Supreme Court (Record, p. 48), this claim to this court, had it even been specially set up, was beyond its cognizance and, therefore, was neither apt nor in time.

The bank taking the judgment for review to the Supreme Court by its second petition in error (June 10, 1904, Record, pp. 64, 65), among the assignments of error again protested its immunity in a similar general manner and form, failing to make any special

claim of immunity under any particular statute of the United States.

To set up a claim of immunity under such a general phrase as "the banking laws of the United States," did not in any way specify which law; it did not advise the Supreme Court which of the original 110 sections of the banking law was relied on; which of the numerous amendments. Such manner of claim would bear an analogy to claims of federal immunity set up generally under mining laws of the United States—a claim uniformly held ineffectual under Section 709.

In fact it can not escape notice that in its grounds for new trial and for reversal, the holding of the Supreme Court that the bank's liability is that of an owner in severalty of the property is distorted, by form of expression, into a liability for a part of a partnership's debts. The Supreme Court of Ohio affirmed the judgment of the circuit court by its judgment entered *February* 3, 1905, and issued its mandate to the circuit court on *February* 6, 1905, to carry this judgment with execution, and on the same day this mandate, with the original papers, were sent to the clerk of the circuit court (Record, pp. 70, 71).

The record thus far discloses that down to the transmission of the cause to the circuit court on February 6, 1905, no special claim of federal immunity had been made by the bank. It has been repeatedly decided that this must be done in order to comply with the requirements of Section 709, U. S. R. S.

In *DeLamar's Nevada G. M. Co.* v. *Nesbett*, 177 U. S., 527, bottom, this court said:

> "To raise a federal question the right must be one claimed under a *particular statute* of the

> United States the validity, construction or applicability of which was made the subject of dispute in the state court; and the decision upon *such statute* must have been adverse to the plaintiff in error."

In *Chapin* v. *Fye*, 179 U. S., 129, it was held:

> "If a party to an action in a state court intends to invoke for the protection of his rights * * * some statute * * * of the United States, he must so declare."

Subsequently on March 7, 1905, on motion of the bank the following certification was entered by the court (Record, p. 71):

> "1. That in the rendition of the judgment of affirmance, it became and was material to determine whether under Sections 5136 and 5137, U. S. R. S., the bank had power to be or become liable for nine-fortieths of the expenses of purchasing, managing, etc., of the property.
>
> "2. That the bank 'claim and ask this court to hold' that under said sections it had no power to be or become liable for any part of said expenses.
>
> "3. That the decision was that the bank could not under said sections become a member of the partnership nor liable for the debts or any part thereof of said partnership, but adjudged that as owner in severalty of nine-fortieths of the property, 'as such owner it did have power under said section to become liable for nine-fortieths of the expenses of purchasing, managing,' etc., etc."

As to the first certification, the construction put by this court upon Section 709, U. S. R. S., makes it essential

to its jurisdiction upon a writ of error, that the immunity be specially claimed *by a party*. Jurisdiction is not conferred by the fact of the state court's considering it material to determine a federal question in arriving at its decision. The Section 709 requires this determination to be adverse to the "immunity specially set up or claimed by either party under *such* * * * statute * * *."

In this certification the court does not attempt to state that in the rendition of the judgment of affirmance on February 3, 1905, any party specially set up or claimed any immunity under the Sections 5136 and 5137; and this certification does not, therefore, fulfill the requirement of Section 709.

The second certification is equally ineffectual to confer jurisdiction on this court. The certificate was made on March 7, 1905, a month after the judgment of affirmance and nearly a month after the Supreme Court had remanded the case (with all the papers) to the lower court to carry the judgment into execution. The certificate, on its face, shows it was on March 7, 1905 (nearly a month after the cause had been sent down to the circuit court and on the day the order allowing the writ of error was filed), that the bank claimed and asked the court to hold that under the particular Sections 5136 and 5137, U. S. R. S., it had no power to become liable for any part of said expenses. This special claim made *on that day* came too late to give this court jurisdiction under Section 709. According to the ruling of this court in *Home for Incurables* v. *City of New York*, 187 U. S., 155, the claim and the certification was too late after the case had ceased to be before the Supreme Court and had been sent down to the circuit court.

In *Powell* v. *Brunswick County*, 150 U. S., 433, 439, it was held that a certificate of the court that a state of case exists for the interposition of the court can not confer jurisdiction to re-examine the judgment below. The office of the certificate in respect to a federal question is to make more certain what is too general and indefinite in the record, but it can not originate the question within the true construction of the statute.

In *Loeber* v. *Schroeder*, 149 U. S., 585, this court said:

> "It is also well settled by the decision of this court that the attempt to raise for the first time a federal question, in a petition for rehearing after judgment, comes too late."

In *Miller* v. *Cornwell R. R. Co.*, 168 U. S., 131, it was held that a suggestion of appearance of a federal question on the record on application for re-argument after the judgment of the trial court is affirmed by the Supreme Court of the state, comes too late.

Pim v. *St. Louis*, 165 U. S., 273.
Sayward v. *Denny*, 158 U. S., 180, 183.
California Powder Works v. *Davis*, 151 U. S., 389, 393.

It was too late to set up the special claim under a federal statute by means of this certification and the jurisdiction of this court on writ of error can not be originated in this manner.

Assuming, *a. g.*, that the bank did set up its federal claim *specially* as required by Section 709, it failed to do so when the cause was the first time in the Supreme Court (in 1903). At that time the Supreme Court was requested to pass upon the bank's power to become liable *as a partner* and it denied such power. The court, however, held that

the record required it to decide the further fact of the bank's ownership in severalty and its liability therefor. And on this record there is no special claim of federal right or immunity made by the bank on this ground. Failing *then* to set up such claim, it was not within Section 709 to make it on the second petition (in 1904) to that court. Nor as already shown could a subsequent certification in March (January, 1905, term), nor a subsequent setting up the claim on March 7, 1905, effect this purpose.

An analogous condition was presented in the record of *Mutual Life Ins. Co.* v. *Kirchhoff*, 169 U. S., 103. According to this case it was for the bank on its first petition in 1903 to have declared specially the protection of the federal statute, which it now claims it made in 1904 on its second petition. The point was embraced in the first decision and the case was before the court at the second trial upon the second supplemental facts ascertained by the circuit court upon the mandate from the Supreme Court.

This court, it is submitted, is without authority to revise the second judgment of the Supreme Court on the ground that the bank was denied any right or immunity properly claimed "in apt time" under Revised Statutes, Section 709.

Western Electric Supply Co. v. *Abbeville Light & Power Co.*, 197 U. S., 299.

In conclusion on this question of the jurisdiction of this court, we claim that it is without jurisdiction—

First. That no claim of protection was made specially as intended by Section 709, Revised Statutes.

Second. That, if held to have been set up in the manner required by this section, it was done only on March

7, 1905, thirty days after the decision and after the case had been remanded to the circuit court.

Third. That the question, having been decided by the Supreme Court in its first decision in 1903, it was too late to invoke the protection of a federal statute against it in the second hearing in 1905.

On the Merits.

The facts of this case are set forth in the statement, *supra*, p. 2. So far as it relates to the bank's connection with the syndicate it is stated (69 O. S., p. 163):

> "One F. B. McFarlan subscribed for certain shares and purchased others, so that he owned nine shares; and being largely indebted to the Merchants National Bank, he transferred said nine shares to said bank to secure said indebtedness about the month of January, 1892, which transfer was made to 'W. W. Brown, trustee,' said Brown being cashier of said bank."

The finding of the court (Record, p. 38) is—

> "That the shares standing in the name of W. W. Brown, trustee, are the shares of the Merchants National Bank, originally held by it as collateral, but transferred to it by the owner when they were transferred to said Brown, that when so transferred the notes for which they had been held as collateral were surrendered and that said shares were entered on the books of the bank as owned by the bank and so reported to the United States Government, and the bank, through its vice-president, took part in the management of said syndicate and in the effort to preserve its property from sacrifice and loss, and all this was

done with the knowledge and acquiescense of the board of directors of said bank."

In the opinion, the Supreme Court (69 O. S., 170) said:

"The circuit court finds that the bank became owner by transfer of nine shares of this syndicate or partnership, which shares were taken by the bank to secure the payment of a large indebtedness owing to said bank for loans by it made to one of its customers in the usual course of business. The bank in accepting said transfer evidently regarded it as a collateral, but it so treated the shares, and so transacted the business as to said shares, that the circuit court found that the bank became the owner of the shares, and there was evidence warranting such finding. The case must, therefore, be determined upon the theory that the bank held the shares as owner and not merely as collateral; the purpose of such ownership, however, being to secure the ultimate payment of said indebtedness out of the proceeds of said shares, and to that end it was necessary that the property of said syndicate should be put into such condition as to yield the most money, and this is what the trustees of the syndicate attempted to do; and in so doing debts were incurred, which the syndicate was unable to pay, and after its property had been consumed in paying said debts, a large debt still remained."

The Supreme Court after deciding in favor of the bank on its claim of *ultra vires* as to partnership, and holding that it was a part owner of the property in question, stated the further fact (69 O. S., 195) that the bank through its trustee managed its several interest in connection with the trustees of the other shares as to their

interests and became liable for its share of the expenses of purchasing, managing, handling, holding, improving, and disposing of the property.

The decision of the Supreme Court to the effect that, by reason of its ownership of the shares, the bank was an owner in severalty of the property, did not present a federal question; it was a decision of the law bearing upon the rights and liabilities of a share owner upon the facts of the case of real property in Ohio.

Kramer v. *Wilson*, 195 U. S., 416.

The state courts found as facts what these expenses were and the proportionate share for which the bank became liable—being the amount of the judgment entered against it.

The question then resolves itself into the following claim of the bank: When a national bank finds that one of its customers has, in the regular course of dealings, become indebted to it, and in order to secure the payment of this debt, in good faith, takes and accepts from him first as collateral and afterwards in satisfaction an equitable undivided part interest in real property, that under Sections 5136 and 5137, United States Revised Statutes, this act is *ultra vires* and of no legal effect whatsoever.

The validity of this proposition in all its parts requires the acceptance of the proposition that it is *ultra vires* to accept such security even as collateral. If it be not *ultra vires* to accept it for collateral, the acquisition of the ownership of it in good faith in furtherance of the same purpose can not reasonably be denounced as *ultra vires*. The validity of holding such a security authorizes the acquiring ownership of it whenever the bank in good

faith considers this step as necessary for the safety of the debt or any part of it.

The facts establish the following points:

1. That the bank became the actual owner of the shares which represented its proportionate ownership of the property.

2. That such ownership was acquired in order to secure a previously contracted debt due it.

3. That it participated with its co-owners in the management of the property.

The acquisition of the shares under these conditions was within the powers of the bank as expressly conferred by the Section 5136, 7th sub., and 5137, 2d and 3d sub., of U. S. R. S.

> *Fleckner* v. *Bank of U. S.*, 8 Wheaton, 351.
> *First Natl. Bank* v. *Natl. Exch. Bank*, 92 U. S., 122.
> *Wylie* v. *Northampton Bank*, 119 U. S., 361.
> *Roebling Sons Co.* v. *First Natl. Bank*, 30 F., 744.
> *Cockrill* v. *Abeles*, 86 F., 505.

These conditions and circumstances were altogether different from those found in the cases wherein the decisions were with the defenses set up by the defendant banks.

In *California Bank* v. *Kennedy*, 167 U. S., 362, and *Concord Natl. Bank* v. *Hawkins*, 174 U. S., 364, the bank's ownership of the shares were as investments. In *Robinson* v. *Southern National Bank*, 180 U. S., 299, and *Rankin* v. *Fidelity, etc., Co.*, 189 U. S., 242, the court found that the bank's holding of the shares was at no time as owner but always as pledgee, and so held out.

But on the other hand, the bank's liability was declared when it was found to have been the actual owner of the

shares, the holding have been originally as a collateral, to secure a pre-existing debt, and the ownership subsequently as an asset further taken to secure the debt.

In *Pauly* v. *State Loan & Trust Co.*, 165 U. S., 606, this court held that the real owner of the shares of the capital stock of a national bank may, in every case, be treated as a shareholder. If the owner transfers his shares to another person as collateral security for a debt he owes him and if with knowledge or by direction of the pledgee the shares are placed in the books of the bank in such way as to imply that the pledgee is the real owner, then the pledgee may be treated as a shareholder and, therefore, liable upon the basis of being a shareholder.

See *Hulitt* v. *Ohio Valley National Bank*, 137 F., 462 (6th Circuit, C. C. A.)

The officers and directors are not in this case chargeable with gross carelessness, much less with actual bad faith, for accepting a collateral of the value which they in good faith attached to it. When the bank caused the shares to be transferred to its cashier as its trustee and in order to preserve its property from sacrifice and loss took part in the management of it by its vice-president, its action was not unusual or at variance with the fair exercise of judgment. It did not enter into any partnership. It assumed its proportion of what may reasonably be incident to the holding and disposing of real property. And it was only this limited responsibility which the Supreme Court of Ohio imposed upon the bank by reason of its ownership. The bank officers by the acceptance of this collateral and by their subsequent action, sought to preserve the bank against the loss of a debt. It certainly constitutes no impeachment of their authority and of the

powers of the bank that the issue of this step was unfortunate. It is from unfortunate results that controversies arise and intervention of courts is invoked. The admission of such an argument would close the courts to all claimants and establish the absolute doctrine that the satisfaction of debt to a national bank by the transfer of any property resulting in further loss is of itself *ultra vires*.

In *National Bank* v. *Exchange Nat. Bank*, 92 U. S., 112, the bank in order to save a loss in one of its transactions involving an outstanding obligation of it, entered into a deal with the holder of this obligation and purchased from him shares of stock to a large amount in order to recover this obligation and in the expectation that the loss would be retrieved in its future handling and disposition of its purchases. Its claim that this purchase was *ultra vires* was denied, it appearing that this stock dealing was not for the purpose of trading solely with a view to profit. The same distinction was made in *Fleckner* v. *Bank of The U. S.*, 8 Wheaton, 351.

In the case at bar the syndicate was not for general trading in land—it was not organized for the purpose of buying and selling generally. Its object and purpose was the handling, improving and selling of a definite and known parcel of real property, present before the parties. Its holdings, its prospects, its realizable property and the value of the same, were as reasonably ascertainable or calculable (if not more so) as many of the ordinary operations of a bank, which involve the determination of the credit of customers or the valuation of securities. The shares were not taken for the purpose of dealing in them. Had the national bank taken a mortgage on a large industrial plant and afterwards become owner of it to save

the loss of the debt—had it then incurred liabilities in its effort to market and dispose of the plant, these transactions though foreign to the ordinary function of a bank, would not be considered *ultra vires*. If a national bank had lawfully acquired an interest in real property for a debt, its purchase of other undivided interests or incumbrances to enable it to manage or dispose of the property would not be *ultra vires*.

Cockrill v. *Abeles*, 86 F., 505.

In *Royal Bank of India*, L. R., 4 Ch., 252, it was held not *ultra vires* for a bank with reference to a property which it was authorized to take and hold as security for a debt, to incur expense in managing and converting it into money in furtherance of this security. The court said (p. 263):

> "Of course, although no banker is authorized to become a partner with merchants or ship owners or builders, or to engage in transactions of that sort, yet he is authorized to lend upon securities of that description, and he is authorized to take every rational course for the purpose of making his securities good and available. In that way he may become liable upon a building contract; in that way he may become liable as a ship owner; in that way he may become liable in respect of matters of freight, or, in fact, in respect of any matters connected with a bill of lading which he holds as a security. *I entirely found my judgment on this, that it is within the scope of an ordinary banking business to make the loans which have been made, and to take the deposit of shares as a security; and when the directors, having done so, afterwards took a rea-*

sonable and bona fide course to realize these securities, they can not now turn around and say that what they did for that purpose was ultra vires, and not justified by their articles of association." [Italics ours.]

We submit that the ownership of these shares by the appellant bank was obtained in the course of dealings within the scope of an ordinary banking business; that it was the exercise of such incidental powers as were necessary to carry on its business of banking; that it was the exercise of its powers of purchasing and holding real estate, for the purpose of security for a pre-existing debt. The liability incurred by such holding was not *in solido* as of a partner, but only proportionate to its partial holding. The amount of it was as a fact found by the state court and by it entered into its judgment which ought to be affirmed.

Respectfully submitted,

WILLIAM J. SHRODER,

Of Counsel for Floris A. Sackett, Executrix.

Supreme Court of the United States.

No. 256.—October Term, 1905.

The Merchants' National Bank of Cincinnati, Plaintiff in Error, vs. Theresa J. Wehrmann, Executrix of William F. Wehrmann, deceased, et al.	In Error to the Supreme Court of the State of Ohio.

[May 14, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill for the dissolution of a partnership, a receiver and an account. The partnership was formed to purchase, improve, divide into lots and sell a leasehold. There were forty shares in the firm, represented by transferrible certificates. The plaintiff in error took nine of these shares as security for a debt, and afterwards became the owner of them in satisfaction of the debt, subject to the question whether the transaction was within the powers of a national bank. It was found at the trial that the partners must contribute to pay the debts of the firm, and some of them being insolvent the Bank was charged with the full share of a solvent partner. The Supreme Court of the State held this to be wrong, but decided that the Bank became a part owner of the property and that, as it joined in the management of the same, it was liable for nine fortieths of the expenses, which constituted the debts of the firm. 69 Ohio St. 160. A decree was entered to that effect, and the Bank brought the case here.

It is objected at the outset that this Court has no jurisdiction because the specific question was not raised sufficiently upon the record. But at the trial the Bank objected that under the statutes of the United States it could not be held liable as a partner, following the frame of the bill and meeting the ruling of the Court. Then, when the Supreme Court, after discussion of the statutes, imposed the modified liability and sent the case back, it objected that under the same statutes it could not be held liable for any proportion of the debts of the firm, and took this question on exceptions again to the Supreme Court. It showed at every stage its intention to rely upon the United States banking laws for immunity, and it would be an excessive requirement to hold the Bank bound in the first instance to anticipate the specific and qualified form in which the immunity finally was denied. In addition to the foregoing facts, all of which appear on the record, the Supreme Court made a certificate part of its record and judgment, to the effect that it became and was material to

consider whether the Bank had power under Rev. Sts. §§ 5136, 5137, to become liable for the nine fortieths as above stated and that the decision was against the claim of the plaintiff in error. *Marvin* v. *Trout*, 199 U. S. 212, 223. *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179. Of course such a claim of immunity under the laws of the United States, if sufficiently set up, can be brought to this Court. *California Bank* v. *Kennedy*, 167 U. S. 362. See *Meyer* v. *Richmond*, 172 U. S. 82.

The question of substantive law presented is not without difficulty. It is not disposed of by the general proposition that a national bank may take by way of security property in which it is not authorized to invest, and may become owner of it by foreclosure or in satisfaction of a debt. It is not disposed of even by the decisions that it may acquire stock in a corporation in this way, *First National Bank of Charlotte* v. *National Exchange Bank*, 92 U. S. 90, and so subject itself to the liability of a stockholder for the corporates debts. *National Bank* v. *Case*, 99 U. S. 628. *California Bank* v. *Kennedy*, 167 U. S. 362, 366, 367. *First National Bank of Ottawa* v. *Converse*, 200 U. S. 425, 438, a proposition not shaken by *Scott* v. *Deweese*, 181 U. S. 202, 218. For it does not follow that because the interest in a partnership is represented by a paper certificate in form more or less resembling a certificate of stock in a corporation and transferrible like it, a national bank can take the partnership certificate to the same extent that it could take the stock.

As the Supreme Court of Ohio assumes such partnerships and certificates to be valid we assume them to be. *Wells* v. *Wilson*, 3 Ohio, 425. *Walburn* v. *Ingilby*, 1 Myl. & K. 61, 76. *Re The Mexican & South American Co.*, 27 Beav. 474, 481; 4 De G. & J. 320. *Phillips* v. *Blatchford*, 137 Mass. 510. We may assume further, in accordance with a favorite speculation of these days, that philosophically a partnership and a corporation illustrate a single principle, and even that the certificate of a share in one represents property in very nearly the same sense as does a share in the other. In either case the members could divide the assets after paying the debts. But from the point of view of the law there is a very important difference. The corporation is legally distinct from its members, and its debts are not their debts. Therefore, when a paid-up share in a corporation is taken, no liability is assumed, apart from statute, but simply a right equal in value to a corresponding share in the assets and good will of the concern after its debts are paid. If the right is worth something it is a proper security, and if it is worth nothing no harm is done. It is true that a statute may add a liability, but when, as usual, this is limited to the par value of the stock, it has not been considered to affect the nature of the share so fundamentally as to prevent a national bank from taking it in pledge, with qualifications, as it might take land or bonds.

But to take a share by transfer on the books means to become a member of the concern. The person who appears on the books of the corporation as the stockholder is the stockholder as between him and the corporation, and his rights with regard to the corporate property are incident to his position as such. *National Bank* v. *Case*, 99 U. S. 628, 631. *Pullman* v. *Upton*, 96 U. S. 328. This does not matter, or matters less, in the case of a corporation, for the reasons which we have stated. But when a similar transfer is made of a share in a partnership it means that the transferee at once becomes a member of the firm and goes into its business with an unlimited personal liability, in short, does precisely what a national bank has no authority to do. This the Supreme Court of Ohio rightly held beyond the powers of the Bank. U. S. Rev. Stats. §§ 5136, 5137. It is true that it has been held that a pledgee may escape liability if it appears on the certificate and books that he is only a pledgee. *Pauly* v. *State Loan & Trust Co.*, 165 U. S. 606. *Robinson* v. *Southern National Bank*, 180 U. S. 295. *Rankin* v. *Fidelity Trust Co.*, 189 U. S. 242, 249. No doubt the security might be realized without the pledgee ever becoming a member of the firm. It is not necessary in this case to say that shares like the present could not be accepted as security in any form by a national bank. But such a bank cannot accept an absolute transfer of them to itself. It recently has been decided that a national bank cannot take stock in a new speculative corporation, with the common double liability, in satisfaction of a debt. *First National Bank of Ottawa* v. *Converse*, 200 U. S. 425. *A fortiori*, it cannot take shares in a partnership to the same end.

We are of opinion that with the liability as partner all liability falls. The transfer of the shares to the Bank was not a direct transfer of a legal interest in the leasehold, which was in the hands of trustees. It was simply a transfer of a right to have the property accounted for and to receive a share of any balance left after paying debts, and the acquisition of this right was incident solely to membership in the firm. If the membership failed the incidental rights failed with it, and with the rights the liabilities also disappeared. Becoming a member of the firm was the condition of both consequences. As the Bank was not estopped by its dealings to deny that it was a partner, it was not estopped to deny all liability for partnership debts. See *California Bank* v. *Kennedy*, 167 U. S. 362, 367. It seems to us unnecessary to add more in order to show that the claim against the plaintiff in error must be dismissed.

Judgment reversed.

Mr. Justice HARLAN, Mr. Justice BREWER and Mr. Justice MCKENNA dissent.